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Brief of Ira Julian for Appt. in 385.

Filed Feb. 17, 1899.

SUPREME COURT OF THE UNITED STATES.

NO. 386

The Farmers Bank of Kentucky, Appellants.

VERSUS

Samuel H. Stone, Auditor, &c., and
The City of Georgetown, Appellees.

BRIEF OF THE CITY OF GEORGETOWN AND SCOTT COUNTY, KY.

L. L. BRISTOW,
City Attorney for City of Georgetown.

J. C. B. SEBREE,
County Attorney for Scott County.

IRA & W. H. JULIAN,
For said City and County.

Georgetown Times Print.

Supreme Court of the United States.

The Farmers Bank of Kentucky, *Appellants.*

vs. } NO. 386

Samuel H. Stone, Auditor, &c.,
and The City of Georgetown, &c., *Appellees.*

BRIEF FOR CITY OF GEORGETOWN AND SCOTT COUNTY, KENTUCKY.

STATEMENT OF THE CASE.

By act of the Kentucky Legislature approved ~~May~~ Feby 16, 1850, the appellant, Farmers Bank of Ky., was incorporated and created a body politic, its charter extending until the first day of May, 1880. It was authorized by its charter to create, and did create branches at Henderson, Ky., and Georgetown, Ky., the charter privileges extending to said branches. By an act of said Legislature approved March 10, 1876, it was provided that the charter privileges of said Bank and its branches should continue for 25 years from the first day of May, 1880, which would make its charter life expire May 1, 1905.

By the original charter of 1850 it was provided that on the first day of July, 1851, and on the first day of July in each succeeding year during the continuance of its charter, the cashier of the principal bank should pay to the Treasurer of the State of Kentucky *fifty cents* on each one hundred dollars of stock, which should be in full for all tax or bonus due the State of Kentucky. It is admitted that the appellant paid this tax of fifty cents on each one hundred dollars of stock down to July 1, 1886. Since that time, such taxes as it has paid have been under and by virtue of what is known as the Hewitt law. (Article 2, chap. 92 General Statutes of Kentucky.)

This "Hewitt law" was an act approved May 17, 1886, entitled "An act to amend the revenue laws of the Commonwealth of Kentucky." The first section provides as follows: "That shares of stock in State and National banks and other institutions of loan or discount, and in all corporations required by the law to be taxed on their capital stock shall be taxed *seventy-five*

cents on each share thereof equal to one hundred dollars, or on each one hundred dollars of stock therein owned by individuals, corporations or societies, and said banks, institutions and corporations shall in addition, pay upon each one hundred dollars of so much of their surplus, undivided surplus, undivided profits or undivided accumulations as exceeds an amount equal to 10% of their capital stock, which shall be in full of all tax, State, county and municipal."

Section 4 of said act provides that "each of said banks, institutions and corporations by its corporate authority with the consent of a majority in interest of a quorum of its stock holders at a regular or called meeting thereof, may give its consent to the levying of said tax and agree to pay the same as herein provided, and to waive and release all right under the Acts of Congress or under the charters of the State Bank to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of such bank and delivered to the Governor of this Commonwealth; and upon such agreement and consent being delivered and in consideration thereof, such Bank and its shares of stock shall be exempt from all other taxation whatsoever so long as said tax shall be paid during the corporate existence of such bank."

Section 5 of said act provides "the said banks may take proceeding authorized by section four of this act at any time until the next meeting of the next general assembly: Provided they pay the tax provided in section one, from the passage of this act."

Section 6 provides "this act shall be subject to the provisions of section eight, chapter 68 of the General Statutes."

Section 7 provides that "if any bank, State or National, shall pay or refuse to pay the tax imposed by this act, or shall fail or refuse to make the consent and agreement as prescribed in section four, the shares of stock of such bank, institution or corporation, and its surplus undivided accumulation and undivided profits shall be assessed as directed by section two of this act, and the taxes, State county and municipal, shall be imposed, levied and collected upon the assessed shares, surplus, undivided

profits, undivided accumulations as is imposed on the assessed taxable property in the hands of individuals: Provided that nothing herein contained shall be construed as exempting the taxation for county or municipal purposes any real estate or building owned and used by said banks or corporations for conducting their business, but the same may be taxed for county and municipal purposes as other real estate is taxed."

The appellant claims to have accepted the provisions of this Hewitt law at a meeting of its stockholders on the 6th day of December, 1887, and files a copy of its acceptance marked exhibit "C" (page 62 of record), and by reason of said acceptance claims to have an irrevocable contract with the State of Kentucky to be taxed at the rate of seventy-five cents on each share equal to one hundred dollars, in full of all tax, state, county and municipal (except as to real estate, surplus, etc.)

But by the new Constitution of Kentucky, section 174, passed in 1891, it is provided that "all property, whether owned by natural persons or corporations shall be taxed in proportion to its value unless exempted by this constitution; and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this constitution shall be construed to prevent the General Assembly from providing for taxation based on income, license or franchise." And section 175 provides: "The power to tax property shall not be surrendered or suspended by any contract or grant to which the Commonwealth shall be a party."

In pursuance of these provisions of the constitution the legislature of Kentucky passed a new revenue law which went into force Nov. 11th, 1892. It provides in substance that an incorporated bank shall, in addition to other taxes imposed on it by law annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town, or taxing district where its franchise may be exercised. The Auditor, Treasurer and Secretary of State are by said act constituted a Board of Valuation and Assessment for fixing the value of said franchise, and the banks are required to file reports before the first of March in each year giving the data upon which said valuation shall be made. Upon this information, and such other

information as the Board can obtain it is authorized and directed to fix the value of the capital stock of the bank and from the amount thus fixed to deduct the assessed value of all tangible property assessed in the State, or in the counties where situated, and the remainder thus found is to be the value of the corporate franchise subject to taxation under said act. The Board shall then apportion the value of such franchise among the several taxing jurisdictions entitled to a share of said tax, and at the expiration of 30 days after determining such value, shall certify to the County Clerk of the counties where any portion of such franchise shall be liable to local taxation the amount thereof liable for county, City or State taxes and such certificate being filed by the County Clerk in his office is certified to the collecting officer of said county and city for collection.

Banks by reason of their claim of an irrevocable contract under the Hewitt law contended that the provisions of the Constitution and act of 1892 above set out were null and void as to them because in violation of that clause of the Constitution of the United States which prohibits any State from passing a law which shall impair the obligation of a contract, and further that it was void because violative of the Constitution of the State of Kentucky in that said Constitution provides that the legislature shall not impose taxes for the purpose of any county, city, town or other municipal corporation, but may by general laws confer on the proper authorities thereof the power to assess and collect taxes, and that the apppointment of a State Board of Valuation for making such assessment and valuation was not in conformity with this clause of the Constitution of Kentucky.

The appellant instituted injunction suits against the City of Frankfort and the County of Franklin, and also against the City of Henderson to enjoin them from collecting taxes under this new revenue law of 1892. These cases all went to the Ky. Court of Appeals, and on the first day of June, 1895, the Court through Chief Justice Pryor rendered its decision to the effect that the acceptance of the provisions of the Hewitt law by the banks constituted a contract between the banks and the State of Kentucky which the latter could not alter or change without the consent of the former, and that the State Board of Valuation and

Assessment had no authority in law to assess or value the plaintiff's franchise for taxation.

Under the mandate in said suits, orders of injunction were rendered in the lower Courts, from which orders appeals are now pending in the Kentucky Court of Appeals. In March, 1897, in the cases of the Deposit Bank of Owensboro vs. Daviess county, &c., the Court of Appeals through Judge Paynter rendered an opinion of the Kentucky Court of Appeals which reversed the opinion as rendered by Judge Pryor and decided that the Hewitt law was repealable and the contracts of the banks under said law had been abrogated by the Kentucky constitution and the revenue act of 1892 above referred to.

On the 17th day of April, 1897, the appellant instituted suits in the United States Circuit Court for the District of Kentucky asking for an injunction against the appellee and others, and claiming contracts under the Hewitt Bill and pleading that by virtue of the decision rendered by Judge Pryor that it had been finally adjudicated that said bank had an irrevocable contract with the State of Kentucky, exempting it from taxation, except as provided in said Hewitt Bill. On June 28, 1898, Judge Taft, rendering the decision for the United States Circuit Court, while deciding that the banks did not have such an irrevocable contract under the Hewitt law, yet that by reason of the plea of *res judicata*, the Pryor judgment was an estoppel as to all parties and privies to the suits pending before said Court. By virtue of this judgment the Board of Councilmen of the City of Frankfort, County of Franklin, the City of Henderson and the County of Henderson were enjoined and estopped from the collection of taxes against appellant. But the Court further decided that the plea of *res judicata* did not hold as against the City of Georgetown and the County of Scott, and as to said City and County the bill was dismissed. From that judgment, this appeal is prosecuted, being case No. 386 herein.

SPECIFICATION OF ERRORS.

The appellant assigns the following specifications of errors to the decree of the Circuit Court of the United States for the sixth circuit and district of Kentucky rendered by Judge Taft on the 25th day of June, 1898, for said Court, to-wit:

And the said complainant further says that said decree is erroneous and against the rights of the complainant, because the court erred in dismissing the complainant's bill as to the County of Scott and the City of Henderson.

2nd. Because the court erred in not deciding that complainant's contract with the State of Kentucky relieved and protected it from the payment of any taxes whatever to the City of Georgetown or the County of Scott for any purpose whatever.

2. Because the court erred in not issuing an order of injunction against the defendants, Sam'l Stone, Chas. Finley & George Long, enjoining them from making an assessment in any way upon any of the stock of complainant at its bank, at Georgetown, for municipal or county taxation, and it erred in not enjoining the said Stone from making any apportionment of complainant's capital stock to the bank at Georgetown for taxation for any purpose whatever.

BRIEF OF ARGUMENT.

The decision of the Court below so far as it affects the appellee, the City of Georgetown and Scott county (see page 182 of record) is as follows: "The Court further finds that there is no irrevocable contract established by judgment or otherwise binding the county of Scott or the City of Georgetown to a compliance with the Hewitt Act in respect to the collection of taxes upon the property or stock of the Farmers Bank of Ky. taxable therein, and therefore that as to such property, and as to so much of said stock as is apportioned for taxation to Scott County or the City of Georgetown under the revenue act of 1892, said act applies and is in force, and the Hewitt act has no application thereto. Wherefore it is adjudged that as to the County of Scott and the City of Georgetown the plaintiff's bill be, and the same is hereby dismissed." And again (see page 232 of record) Judge Taft holds as follows: "There was no adjudication however between the Farmers Bank and either Scott County or Henderson County. It therefore follows from what has already been decided that as to Scott County and Henderson County the demurrers to the bill should be sustained and the bill must be dismissed."

In discussing the assignment of errors above set out we will

first consider the question as to whether the appellant had an irrevocable contract under the Hewitt Act exempting it from taxation (except as provided in said act;) and secondly, if it had no such contract whether the appellees the City of Georgetown and County of Scott are bound by the decision of Chief Justice Pryor under the plea of *res judicata*.

1.—HAD APPELLANT AN IRREVOCABLE CONTRACT.

The 6th section of the Hewitt Act provides that said act shall be subject to the provisions of section 8, chapter 68 of the General Statutes. Said section 8 is as follows: "All charters and grants of or to corporations, or amendments thereof enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to amendment or repeal at the will of the legislature unless a contrary intent be therein plainly expressed, provided, that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested." This is known as the act of 1856 and has been in force as a part of the charter of all corporations since 1856. When the charter of the appellant was extended for 25 years by the act of March 10, 1876, the act of 1856 became a part of said charter, and when said appellant accepted the terms of the Hewitt Act it was especially provided as above shown that said act of 1856 should be a part of said act. It would therefore seem plain that the State of Kentucky reserved the right to repeal the said Hewitt Act whenever the legislature saw fit so to do. The act of 1892 was unquestionably a repeal of the Hewitt Act. Did the legislature have a right to repeal said Act? Quoting from Judge Paynter in the case of the Deposit Bank of Owensboro vs. Daviess County, 19 Ky. Law Reporter, page 254: "It must be conceded from authorities the Supreme Court of the United States has repeatedly held that the legislatures of the states have the power when reserved in the charter, or by general law, to change or repeal acts granting corporate privileges or franchises, (citing Tomlinson vs. Jessup 15 Wall, 454. Railroad Co. vs. Maine, 96 U. S., 499, Railroad Co. vs. Georgia, 98 U. S. 359; Hoge vs. R. R. Co. 99 U. S., 348; Greenwood vs. Freight Co. 105 U. S. 13, 21; Water Works vs. Schottler 110 U. S. 347, 352; Close vs. Cemetery Co. 107

U. S. 466, 476; Louisville Gas Co. vs. The Citizens Gas Light Co. 115 U. S. 683, 696; Gibbs vs. Gas Co. 130 U. S. 396-408; Sioux City St. Ry. Co. vs. Sioux City, 138 U. S. 98-108).

In the Hamilton Gas Light and Coke Co. vs Hamilton City 146 U. S. 271, it was held "This reservation of power to alter or revoke a grant of special privileges necessarily became a part of the charter of every corporation formed under the General Statute providing for the formation of corporations. The legislative grant to a corporation of special privileges, if not forbidden by the constitution, may be a contract, but where one of the conditions of the grant is that the Legislature may alter or revoke it, a law altering or revoking, or which has the effect to alter or revoke the exclusive character of such privileges cannot be regarded as one impairing the obligation of the contract whatever may be the motive of the legislature, or however harshly such legislation may operate in the particular case upon the corporation or parties affected by it. The corporation by accepting the grant subject to the legislative power so reserved by the constitution, must be held to have assented to such reservation. The decisions of the Court of Appeals of Kentucky are in accord with these opinions. (See case of Griffin vs. Insurance Co., 3 Bush., 592; Cumberland & Ohio R. R. Co., vs. Barren County Court, 10 Bush., 604; in Water Co. vs. Clark 143 U. S., the Court held as follows: "But in respect to all the acts passed after 1856 amending the charter of or relating to the Water Co., &c., each must be read as if all the provisions of the act of 1856 were incorporated in it, because in no one of them is plainly expressed an intent to waive the right of amendment or repeal, at the will of the legislature." How much, therefore should the power to repeal or amend the charter of appellant be construed to be a part of said charter when by the terms of section 6 of said Hewitt Act, the act of 1856 is specifically made a part of said Hewitt Act. But as Judge Paynter, in rendering his opinion, has well said,—"To simply quote the act extending the Charter is a sufficient denial of and answer to the claim of an irrevocable contract:" It reads as follows: "That the Charter of the Farmers Bank of Kentucky as amended be extended for a period of twenty-five years from the termination of its charter as

therein fixed: *Provided* that said charter and amendments shall be subject to amendment or repeal by the General Assembly either by general or special act; and, *proviced, further*, that whilst the privileges and franchises so granted may be changed or repealed no amendment or repeal shall impair other rights previously vested."

What is meant by "other rights previously vested" referred to in extension of appellant's charter, and also referred to in section 6 of the Hewitt Act? In Judge Pryor's decision, before mentioned, he holds that the contract to pay 75 cents on each one hundred dollar share of stock, &c., as provided in the Hewitt Act included such "other rights." On the other hand, Judge Paynter in his decision above referred to holds that this privilege of being exempted from general taxation by the payment of a less amount than other tax payers is one of those "privileges and franchises" which it is expressly declared in said Hewitt Act may be changed or repealed, and that "other rights" are such as the beneficiaries under the charter or general laws may have in property, contracts, choses in action, real and personal property, in fact every interest which they could acquire in operating under the charter or law, and such other rights or interests as other persons may have previously acquired by contract, mortgage, judgment or otherwise in property belonging to the corporation, for said he, "To say that the law granting the privilege can be repealed because the right to do so was reserved, as is admitted, and still leave the banks in its enjoinment (as is the effect of the opinion of the Court in the Bank Tax cases), is to disobey a plain statute, to ignore the authority of the opinions of the Supreme Court, and is a failure to follow sound reasoning in the settlement of a question of vast importance to the state and the people. The former opinion on this question gave the banks the substance and the State the shadow. Had section 6 of article 2 (Hewitt Act) provided that the act of 1856 should not be considered part of it, we do not doubt the representatives of the bank would have easily seen the meaning of the provision. As it is plainly written that the act of 1856 is to be considered a part of the article they have the very greatest difficulty in seeing the purpose of the provision."

Surely the view taken by Judge Paynter is more logical than that of Judge Pryor. It is in conformity with section 174 of the Constitution of Kentucky which provides that "All property, whether owned by persons or corporations should be taxed in proportion to its value unless exempted thereby; and that all corporate property should pay the same rate of taxation paid by individual property." Why is not Judge Paynter's a just and equitable construction? Do not banks receive the benefits of municipal and county government? Are they not protected by the local authorities, and do they not obtain their share of the benefits of public improvements? It is said that the increased burden upon the banks under the act of 1892, with an arbitrary 6% interest rate, will force them out of business. That may be true but it does not help the argument. It may prove that taxes are too high, or that the legal rate of interest is too low, but it shows no reason why a corporation should be partially exempted from taxation any more than the ordinary citizen.

Moreover the law of the State of Kentucky does not favor such exemptions. In addition to sections 174 and 175 above quoted, section 3 of the Kentucky Constitution (page 87 Ky. Statutes) provides: "No grant of exclusive, separate, public emoluments or privileges shall be made to any man or set of men except in consideration of public services, but no property shall be exempt from taxation except as provided in this Constitution; and every grant of a franchise, privilege or exemption shall remain subject to revocation, alteration or amendment."

In the Commonwealth vs. Masonic Temple 87, Ky., 349, it was held that "immunity from taxation is from its nature a personal privilege which can be granted by the legislature *only in consideration of public service to be rendered by the beneficiary*, or to religious bodies, charitable institutions or schools." And in the case of the Commonwealth vs. McKibben, 90 Ky., 384, it is laid down as the established doctrine of the State under its Bill of Rights that "No man or set of men are entitled to exclusive, separate, public emoluments or privileges from the community, *but in consideration of public services*," and citing with approval Bailey vs. New York 3 Hill, 531. In that case, after laying down the doctrine that exemption from taxation should

be conferred only on public corporations that render some public service, and not on corporations created for private emolument it declares: "If (the powers conferred are) granted for public services exclusively they belong to the corporate body in its public, political, municipal character; but if the grant was for the purpose of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation *quo ad hoc* is to be regarded as a private company." Said case of the McKibben vs. The Commonwealth also cites with approval the case of Barbour vs. Board 82 Ky., 649, and declared: "Judge Hines announces the correct doctrine on this subject in the following strong and comprehensive language: 'The power of taxation grows out of the necessity to preserve the government by laying the common burden upon every citizen enjoying its protection of life, liberty and property, and is limited in its nature to objects that are public, as distinguished from those that are personal or private in their character. Taxation immediately for the benefit of an individual is a contradiction in terms which is prohibited by the fundamental law unless it is granted as a public privilege in consideration of public services. If the legislature were to authorize the payment of a person's expenses in the performance of any enterprise not a public service, there can be no doubt that such an act would be declared unhesitatingly unconstitutional; and to exempt a person's property from taxation in consideration of the same service would be equally unconstitutional. To exempt a person's property from taxation is to increase the burden of taxation upon all other tax payers. The true test in such case is, has the legislature the constitutional power to authorize the direct payment for the services? If not, she cannot exempt the person's property from taxation'." (14 S. W., 502).

In the case of Clarke vs. The Louisville Water Co., the Water Company as in the case at bar, claimed "vested rights." The following was declared to be the doctrine of the Court in its opinion given adversely to said Company's claim:—"It is claimed for the Company that it has a vested right to the exemption resting in contract; as the exemption of one person from taxation places an additional burden upon the other tax payers

of the State, *it will not be presumed but must appear by clear grant.* It is true, that the exemption is the exception and not the rule."

This doctrine, as enunciated by the Kentucky Court of Appeals, is declared by Judge Taft in his decision in these cases (page 224 of the record) to be also the doctrine of the Supreme Court of the United States. Citing the case of the Ohio Life Insurance & Trust Co. vs. Debolt, 15 How. 435 he says: "It is well settled by the Supreme Court of the United States that tax exemptions are not favored and are to be given the strictest construction; and it may well follow, as a corallary to these principles, that laws passed by the legislature to prevent irrevocable tax exemptions are to be liberally construed."

It is true that the appellant is not claiming total exemption from taxation, but it is claiming an irrevocable right to a lower rate of taxation, which is in effect a partial exemption whereby the burdens of taxation are made greater on other tax payers. The appellant, The Farmers Bank of Ky, performs no public service to entitle it to even partial exemption, and it is therefore against the policy of the Commonwealth to admit such a right. May it not therefore be well to hold in the case at bar as Judge Pryor announces in his oft quoted opinion: "The rule is,—if a statute is susceptible of two constructions, that which is consistent with public policy will be followed." (Page 108 of record.) And as it is not consistent with public policy, as stated in Clarke vs. The Louisville Water Co., to exempt one person from taxation and thereby place additional burdens upon other tax payers, it cannot be conceived that the State meant in passing the Hewitt Act to give banks irrevocable contracts for partial exemption from taxation. Or as Judge Taft expresses it in his decision in the Court below, (page 224 of record): "We are unable to perceive any plain expression of the intention to make the rights and privileges granted irrevocable. They are granted for 20 years (Franklin County Bank vs. Deposit Bank), and without the rule of construction enjoined in the act of 1856 this would be held to imply an intention that they should not be subject to amendment or repeal during that period. *But the act of 1856 was for the precise purpose of avoiding the usual im-*

plications, and of requiring affirmative language to sustain the claim, that rights and privileges granted for any length of time could not be revoked before its expiration. Griffin vs. Ky. Insurance Co. 3 Bush, 592; Cumberland & Ohio R. R. Co. vs. Barren County, 10 Bush, 609. We find no such affirmative language in this act."

For the above reasons, and the much more weighty ones set out in other briefs filed in this case, we can but believe that this Court will hold with Judge Paynter, (Ky. Law Reporter, page 263): "We conclude that the obligations of no contracts were impaired by the action of the Constitutional Convention or of the succeeding legislature. Some of the best lawyers in the State were members of the Convention which framed our Constitution, who gave an earnest consideration to the questions involved in these cases, and the conclusions which they reached were crystalized in section 174 of the Constitution. We believe that their conclusions are correct."

The complainant in this case is like a favored and spoiled member of a large household, whose too partial parents have for a long time permitted him much greater privileges than his less fortunate brethren, yet always with the distinct understanding that these privileges may be taken from him at the will of those who granted them. When after a prolonged indulgence, he is at length called upon to give up his special privileges, and become an equal sharer with his brothers and sisters in the common burdens of the family, should he be heard to come into Court, like the Appellant, with the cry of "vested rights" on his lips, and the claim that it will work a great hardship on him to put him on a common footing with the other members of the household? Surely it would be a complete answer to such a plea to say: "Yes, it is a hardship, but no greater than your brethren bear, and if you have been provident in the use of your former privileges, you should be all the better prepared to undergo the deprivation of them. If, on the contrary, you, with the distinct reservation in your grant ever staring you in the face, have not foreseen and anticipated the present situation, it is your own fault, and the court will not listen to so childish a plea."

2—THE PLEA OF RES JUDICATA.

Judge Taft, in rendering his decision in the court below, while holding that the former adjudications of the Ky. Court of Appeals to the effect that the banks had an irrevocable contract under the Hewitt Act, bound *the parties to the suit*, yet that: "The court further finds that there is no irrevocable contract established, by judgment or otherwise, binding the county of Scott or the city of Georgetown to a compliance with the Hewitt Act in respect to the collection of taxes upon the property or stock of the Farmers' Bank of Kentucky taxable therein, and therefore that as to such property and as to so much of the said stock as is apportioned for taxation to Scott county or the city of Georgetown under the revenue act of 1892 said act applies and is in force, and the Hewitt act has no application thereto. Wherefore it is adjudged that as to the county of Scott and the city of Georgetown the complainants bill be, and the same is hereby, dismissed." (See page 182 of Record).

The reasons for the above holding are clearly set forth in the case of President, Directors and Company of the Northern Bank of Ky. vs. Samuel H. Stone, etc. (page of Record 217-220). The Defendants in that case were the City of Lexington, County of Fayette, City of Paris, County of Bourbon, and the City of Covington. The complainant in that case contended that because the County of Bourbon, a municipal corporation under the State, was bound by a former adjudication against it, that therefore the State itself and every subdivision of it (including the other defendants) were equally bound. Judge Taft answers this in the following conclusive language:

"The argument of counsel assumes that as the county derives its power to tax from the State * * * it is, in levying taxes, the mere agent of the State and therefore a judgment against the county on a tax question is a judgment against the agent in respect of the business of the principal and is binding upon the latter as a privy. Indeed the argument goes further. It assumes that a county is a part of the State government and therefore a judgment against the county is a judgment in fact against the State.. This is applying the doctrines of agency and privity under circumstances to which they

have but little application. The source of all political power including the power to tax is in the people of the State. By a constitution they create a State government and a legislature and confer upon the legislature power to organize local municipal governments and to give such governments the power to levy taxes in order to discharge their other appointed functions. *The municipal governments are entities distinct from the State government, incurring liabilities of their own in no way binding upon the State, and acquiring rights and property in which the State has no property interest.* Except where the law makes the municipal government an agent for the State in collecting the State's taxes or in discharging some other State function, there is no relation between the one and the other of principal and agent as that relation is usually understood in the law. * * * In the present case the subject-matter of the former litigation was the taxes due from the complainant bank to Bourbon county—taxes which were to be expended by Bourbon county for county purposes and for the benefit of the people living in Bourbon county. The subject-matter of the present action which it is sought to conclude by the former action, (Franklin county vs. Deposit Bank 87, Ky., 382,) is the taxes due from the complainant bank to the city of Paris to be expended for the benefit of the people of that city, to the county of Fayette to be expended for the benefit of the people of Fayette, to the city of Lexington to be expended for the benefit of the people of Lexington, and to the city of Covington to be expended for the benefit of the people of the city of Covington. *The rights of these various municipal corporations to the taxes claimed grow out of the same revenue act of November 1892, but the parties and the persons in interest are different.*"

The last sentence of above opinion declares what are the indispensable requirements of a successful plea of *res judicata*; to-wit: The former adjudication upon which the plea is rested, must have been upon the same issues and between the same parties, as in the case in which it is pleaded. In fact there are four essentials to a successful plea of *res judicata*. (See Freeman on Judgments sec. 252.)

1. Identity in the subject matter.

2. Identity of the cause of action.

3. Identity of persons and parties.

4. Identity in the quality of the persons for or against whom the claim is made.

Benz vs. Hines 3 Kansas 397; 89 Amer. Dec., 594; State vs. June 1 30 La. Ann. 861; Slocumb vs. De Lizardi 91 Amer. Dec., 740. See also to same effect Bouvier Law Dictionary,—subject, Res Judicata, citing (1) 5 Mees & W. Exch. 109; 3 East, 346; 7 Johns N. Y., 20; 1 Hen. & M. Va., 449; 1 Dana Ky., 434; (2) 6 Wheat 109; 2 Gall. C. C. 216; 17 Mass. 237; 2 Leigh Va. 474; 8 Conn. 268; 1 Nott & M. C. So. C. 239; 16 Serg. & R. Penn. 282; (3) 7 Cranch 271 1 Wheat 6; 14 Serg. & R. Penn. 435; 4 Mass. 441; 2 Yerg. Tenn. 10; 5 Me. 410; 8 Gratt. Va. 68; 16 Mo. 168; 12 Ga. 271; 21 Ala. N. S. 813; 4 Den. N. Y. 302; 23 Barh. N. Y. 464; (4) 5 Coke 326; 4 Tenn. 490; 6 Mann & G. 164; 4 C. B. 884.

The complainant claims that the Circuit Court erred in dismissing its bill as to the County of Scott in not holding that its so-called contract with the State of Kentucky relieved and protected it from the payment of any taxes whatever to said County and the City of Georgetown; and suggests in his brief that Judge Taft was acting under a misapprehension as to the facts in the case. He further claims in said brief that the City of Georgetown and County of Scott were necessarily privies to the former judication because the same questions were decided in the Franklin and Henderson cases; and that their not making any attempt to tax the bank until now is tantamount to their acquiescing in and consenting to the status of the bank as fixed in said former decision. As to the latter suggestion it is sufficient to say that there was no compulsion upon either of said appellees to test the questions involved and it was good policy to await the action of the Court of Appeals in the Franklin and Henderson cases to which they were not parties. It is difficult to see upon what ground the appellant arrives at the conclusion that the City of Georgetown, and County of Scott were "necessarily privies." They do not come under any of the definitions laid down in the text books or decisions of the Courts defining the word "privies." (See Van Fleet's former Adjudication vol.

2, page 910 and notes.) The same authority, page 909-10 says as follows: In section 459: "In order to conclude any right, title or interest of a person by an adjudication, it is essential that he be a party to the proceeding, or represented by one. In the latter case he is said to be a privy."

The City of Georgetown and County of Scott were neither parties to the decision known as the Pryor decision, nor were they represented by any one in said cases. It is difficult, therefore, to see how that decision can be pleaded as *res judicata* so far as said City and County are concerned. The principles and rules which govern the doctrine of *res judicata*, formulated in the Duchess of Kingston's case (20 Howell's State trial, 355-652) as laid down by the Judges in that case over 100 years ago, and the basis of all subsequent decisions, are as follows: "A transaction between two parties in judicial proceedings ought not to be binding upon a third; for it would be unjust to bind any person who could not be admitted to make a defense, nor to examine witnesses, nor to appeal from a judgment he might think erroneous. * * * From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true. First, that the judgment of a Court of concurrent jurisdiction, directly upon a point, is, as a plea, a bar, or as evidence, conclusive *between the same parties upon the same matter directly in question* in another Court. Secondly, that the judgment of a Court of exclusive jurisdiction directly upon the point, is, in like manner, conclusive *upon the same matter, between the same parties*, coming, incidentally in question in another Court for a different purpose."

The above several opinions and quotations from text books would seem to furnish a conclusive answer to the appellant's claim of *res judicata*, so far as the City of Georgetown and County of Scott are concerned. And as to his claim that because the State of Kentucky was "practically" a party to the old suits, that therefore said County and City are parties or privies, it will be sufficient refutation to refer to Judge Taft's clear and logical discussion of this point herein above quoted in the case of the Northern Bank of Ky. vs. Stone et al.

Referring again to the appellant's claim in its brief, that by ason of the Appellees, City of Georgetown and County of ott, "not making any attempt to tax the bank until now is ntamount to their acquiescing in and consenting to the status the bank as fixed by these decisions," we would respectfully ggest that there is *nothing in the record to show that said two pellees have not made attempts to collect such taxes each year nce the passage of the act of 1892;* and we especially deny that ey have not made attempts to collect such taxes.

Wherefore, we respetfully submit that the judgment of the rcuit Court in the case of Farmers Bank vs. Stone, etc., that ere "is no irrevocable contract established by Judgment or herwise binding the County of Scott and the City of George-wn to a compliance with the Hewitt Act in respect to the col-ction of taxes upon the property or stock of the Farmers Bank Kentucky, and therefore that as to such property and so much said stock as is apportioned for taxation to Scott County or e City of Georgetown under the revenue act of 1892 said act f 1892) applies and is in force, and the Hewitt Act has no plication thereto," be affirmed; and that the bill of complaint rein so far as it applies to said city and county, be dismissed.

L. L. BRISTOW, City Attorney
For the City of Georgetown.
J. C. B. SEBREE, County Attorney
For the County of Scott.
IRA & W. H. JULIAN,
For said City and County.

Supreme Court of the United States.

SAMUEL H. STONE, Etc., ... *Appellants,*

vs. **No. 385.**

THE FARMERS BANK OF KENTUCKY, ... *Appellee.*

THE FARMERS BANK OF KENTUCKY, ... *Appellants,*

vs. **No. 386.**

SAMUEL H. STONE, Auditor, Etc. and the City of Georgetown, Etc., ... *Appellees.*

BRIEF OF THE FARMERS BANK OF KENTUCKY IN BOTH CASES.

STATEMENT OF CASE.

On May 8, 1897, the appellee, the Farmers Bank of Kentucky, filed its Bill of Complaint in the Circuit Court, Sixth District of Kentucky, against the defendants, S. H. Stone, Auditor, and others. The Bill, after setting forth the status of the different defendans, states:

That the Farmers Bank of Kentucky was incorporated February 16, 1850, and defines its corporate powers, etc. That in accordance with its charter it established the mother bank at Frankfort, and a branch at Henderson and one branch at Georgetown, in Scott County, Kentucky. That the original charter was for thirty years and expired May 1, 1880. On March 10, 1876, its charter was extended for twenty-five years longer by an act of the Legislature. The charter also provides that the bank shall pay fifty cents on each share of its stock of $100.00 a share in full of all tax or bonus. It is alleged that the rights of the bank have been fixed and determined by a settled line of decisions of the Supreme Court of Kentucky. That in 1869 it was decided by said court in the case of the Farmers Bank vs. Greenup County, reported in 6th

Bush, page 127, that real estate purchased by the bank for debt could not be taxed for municipal purposes. That in 1884 the Farmers Bank filed an injunction suit against the county of Franklin (see exhibit A., p. 17, of record), and also filed a suit against the Board of Councilmen of the City of Frankfort (see record page 41). Both of these cases raised the question whether the bank had contract rights under its charter, and the lower court decided that it had, and that it extended during the life of its charter under the Extension Act.

These cases were both affirmed by the Appellate Court. The records of these cases are fully set forth in the record in this case. The Bill also set forth the Hewitt Act, and that it complied with and accepted its provisions, and that after the passage of the Act of 1892 the City of Frankfort and County of Franklin attempted to tax the mother Bank for municipal purposes, and that the City of Henderson also attempted to tax the Bank of Henderson. Injunction suits were filed by the Bank against all of the above named parties, and the court below decided against the Bank. The cases were taken to the Kentucky Court of Appeals, and that Court on the first day of June, 1895, decided that the acceptance of the Hewitt Act by the Farmers Bank of Kentucky constituted the irrevocable contract between the Bank and the State, and that the Bank could not be taxed for any purposes except as authorized and empowered to do so under said Hewitt Act, and directed the lower court to render judgment in accordance with that opinion or decision of the Appellate Court, which was accordingly done. (See record of the case of Farmers Bank vs. Franklin County on page 63 of record, it being exhibit "D.") On page 79 is the judgment in accordance with the mandate of the Appellate Court. The record of the Farmers Bank vs. The Board of Councilmen of the City of Frankfort is exhibit "F," and is on page 80 of the record. The judgment in conformity with the opinion in this case is on page 127 of the record. The record in the case of the Farmers Bank vs. the City of Henderson is exhibit "H," and is on page 128 of record. The judgment rendered by the Henderson Circuit Court in conformity with the opinion of the Court of Appeals is on page 136 of the record.

The Farmers Bank filed an Amended Bill setting up a judgment and plea of *res judicata* against the County of Henderson. This Amended Bill is on page 161 of the record, and the record of the case in the Henderson Circuit Court is exhibit "N," and is on page 164 of record, and on page 171 there is a copy of the judgment rendered in that case in conformity with the opinion of the Appellate Court, rendered by Justice Pryor. There is also a second record filed with the Amended Bill of the Farmers Bank vs. the County of Henderson, it being exhibit "M.," and is on page 173 of record, and the judgement is on page 178. These records and judgements were all pleaded and relied upon as *res judicata.*

The Bill also sets up and relies upon the acceptance of the Hewitt Act as constituting a valid and irrevocable contract, and also claims that if the acceptance of the Hewitt Act is not a valid contract and that the State has the right to retire from it, then and in that event the Bank is remitted to its rights as adjudicated under its charter and can only be made to pay fifty cents on each share of its capital stock.

Demurrers, answers and replications were filed by the parties, and the issues all made up, which are all issues of law, no issues of facts having been raised, and by agreement of parties the case was submitted for final judgment before Justice Harlan, Judges Lurton and Taft, and Judge Taft delivered the opinion of the Court, and decided that by reason of the Pleas of *res judicata*, the Farmers Bank of Kentucky had an irrevocable contract with the State of Kentucky which applied to the City of Frankfort and the County of Franklin, the City of Henderson and the County of Henderson, but did not apply to the City of Georgetown or the County of Scott, and sustained and made perpetual the injunction as to all of the defendants to the Bill except as to the City of Georgetown and the County of Scott, and dismissed the Bill as to the said City of Georgetown and County of Scott.

The appellants rely upon the following assignment of errors:

First. Because the Court erred in overruling the demurrers of each of said defendants to the complainants petition.

Second. Because the Court erred in overrulling the plea of the Board of Councilmen of the City of Frankfort and County of Franklin to the jurisdiction therein.

Third. Because the Court erred in refusing to permit defendants the Board of Councilmen of the City of Frankfort to file the amended answer offered by them herein on the 25th day of June, 1898.

Fourth. Because the Court erred (after deciding that complaintant did not have any irrevocable contract under and by virtue of Article 2 of the Act of the General Assembly of the Commonwealth of Kentucky entitled "An Act to amend the Revenue Laws of the Commonwealth of Kentucky," approved May 17, 1886), in adjudging and decreeing, nevertheless, that by reason of the several pleas *res judicata* relied on by complainant in its bill the complainant has established a contract with the Commonwealth of Kentucky under the provisions of the Act aforesaid.

Fifth. Because the Court erred in enjoining and restraining the defendants, Samuel H. Stone, Auditor; Charles Finley, and Geo. W. Long, from proceeding to value the franchise of the complainant under the Act of November 11, 1892, for the years 1895, 1896, 1897, 1898 and for all subsequent years until the expiration of complainants charter, and also erred in enjoining and restraining the County of Franklin and Board of Councilmen of

the City of Frankfort from endeavoring to collect any tax upon any valuation from the complainant, and also erred in adjudging that complainant, by making payment of taxes to the State only in accordance with the Hewitt Law, is discharged in full of all taxes, and also erred in adjudging that the present Constitution of Kentucky and the Act of November 11, 1892, in so far as intended to provide or do provide for any assessment or taxation of complainant's property, or franchise except under said Hewitt Bill, are repugnant to the Federal Constitution and void.

I.

FIRST AS TO THE JURISDICTION.

The Bill attacks the Revenue Act of 1892, and seeks relief from its enforcement against the appellee upon the ground that it violates that clause of the Federal Constitution which forbids a State from passing a law impairing the obligation of contracts. The court below had jurisdiction by virtue of the Act of August 13, 1888, which reads as follows:

"That the Circuit Court of the United States shall have "original cognizance, concurrent with the courts of the several "States, of all suits of a civil nature at common law, or in "Equity, or in which the matter in dispute exceeds, exculsive "of interest and costs, the sum of $2,000, and arise under the "Constitution or laws of the United States."

This case is one arising under the Constitution of the United States, and as it involves more than $2,000, it was within the jurisdiction of the Circuit Court.

The law is also clear that this court has equitable jurisdiction and that an injunction will lie. This jurisdiction is pointedly recognized by this court in the case of City of New Orleans vs. Citizens Bank of Louisiana, reported in 167 United States, p. 371, and in the case of Shelby County vs. Union Bank, reported in 161st U. S., p. 156. In these cases the court distinctly holds that the existence of a contract as alleged in the Bill of Complaint gives the court jurisdiction in equity to enjoin the collection of a tax that would impair the obligation of the contract set forth in the bill.

Section 530, High on Injunctions, reads as follows:

"An important exception to the general doctrine of non-inter- "ference by injunction against the collection of revenue, because "of illegality of the tax, is recognized in that class of cases where "the relief is sought against a tax assessed upon property which "has been exempted by law from taxation. Indeed, the exception

"has been so uniformly recognized as to become, of itself, "a governing rule in the class of cases now under consideration. "And it may be laid down as the established doctrine of the "courts, that the attempted enforcement of a tax upon a property "which has been exempted by proper legislative authority from "the burdens of taxation, constitute a grievance of so irreparable a nature as to merit preventive relief by injunction, and "where an act of the legislature, held by the court to be constitutional, exempts certain property from taxation, an injunction "will be allowed against the enforcement of a tax upon such "property. *So, an injunction may be granted against the assessment of the property of a corporation where, under the terms of its charter as construed by the court of last resort of the State, the property is exempt from taxation.*"

Citing Morris Canal and Banking Co. vs. Jersey City, 1 Beas., 227. To the same effect see Spelling on extraordinary relief, Vol. 1, Sec. 672. In Union Telegraph Co. vs. Norman, 77 Fed. Rep., p. 21, equitable jurisdiction was taken by the court, and one of the grounds specified by the court was the uniform practice in Kentucky to allow the remedy of injunction to restrain the assessment or collection of an illegal tax.

In the case of Gates vs. Barrett, 79 Kentucky, page 296, upon this question of injunction to restrain the collection of a tax, the Court says:

"The right to have an injunction to restrain the collection of "an illegal tax has been so long recognized and acted upon in "this State that it is unnecessary to stop to inquire upon what "ground that jurisdiction is exercised by courts of equity."

Also see Baldwin vs. Shire, in 84 Ky., 510, and Norman vs. Boaz, 85 Ky., p. 560, to the same effect.

We also refer the Court to the opinion of Judge Taft on this subject on pages 190, 191 and 192; the reasoning of the judge and the authorities cited by him show conclusively that the Court has jurisdiction of the Bill. We deem it unnecessary to quote this part of the opinion of Judge Taft, as it will be carefully read by the Court. This opinion was delivered in the case of the President, Directors and Company of the Bank of Kentucky vs. Stone, etc., but it applies equally and just as forcibly to the Farmers Bank of Kentucky case.

II.

AMENDED ANSWER.

The assignment of error that the Court erred in refusing to permit the defendant the Board of Councilmen of the City of

Frankfort to file the amended answer offered by them on the 25th day of June, 1898, is not well taken, because the exhibit filed with the amended answer shows that the judgment pleaded and relied on by the complainant in this case was rendered as alleged in the Bill in comfority with the opinion and mandate of the Court of Appeals, and stands unreversed, and as a matter of law, the Kentucky Court of Appeals had no power to reverse a judgment rendered in accordance with its own mandate. To do so would be to stultify itself and go outside of its jurisdiction; furthermore, this Court passes upon the record as it finds it, and will not hold its decision in obeyance by reason of any appeal that may have been taken from the judgment. The only available plea would be a plea that the judgment had been lawfully reversed. Whenever that judgment is reversed, if ever, it can be then set up, and proceedings had to collect the tax, to which the bank could respond and set up the judgment in this court, and it would then be for the State Court to decide the question raised just as stated by Judge Taft in regard to the pendency of the mandamus suit in the Franklin Circuit Court, the Court will note, from the record filed with the amended answer, page 237 of record, that the appeal was not filed until the 21st day of January, 1898, long after this case had been submitted. As Judge Taft said, upon refusing to permit it to be filed, 'it can cut no figure in this case. The judgment pleaded is a bar and an estoppel until it is reversed, and it is time enough for appellant to make the plea when the judgment is reversed. This court has held in the following cases, that a judgment of a court on a matter within its jurisdiction, is binding until it is reversed or modified. State v. Neuer, 9 Pet. 8. Cock v. Halsy, 16 Pet., 71; Huff v. Hutchinson, 14 Howard, 586; Bryan v. Kenntt, 113 U. S., 179; also in 18 Howard, 497; 3 Wall., 744; 4 Wall 435; 10 Wall., 308 and 16 Wall., 352. These authorities are conclusive upon this point, as long as the judgment stands unreversed it is a complete estoppel. The record shows that no supercedeas bond was executed. Section 747 Civil Code provides:

"An appeal shall not stay proceedings on judgments, unless "a supercedeas is issued."

The quotation in the brief of appellant from Freeman on Judgments, section 328, does not show the law on the subject; we ask the Court to read all of that section, and it will find that the pendency of an appeal does not and should not deprive the party of the benefit of the judgment as an estoppel.

In Parkhurst v. Burdell, reported in 6th Am. St. Rep., page 384, the New York Supreme Court decided that:

"An appeal from a judgment does not suspend its operation "as an estoppel."

And on page 389, there are notes, from which we quote as follows:

"Judgment is conclusive upon points involved until annulled "or reversed by a proper proceeding. Ellis vs. Clark, 19 Ark., "420; 70 Am. St. 603; Tadlock vs. Accles, 20 Tax., 782; 73 "Am. Dec., 213; and see the extended notes to Lea vs. Lea, 96 "Id. 775 et seq."

"The effect of an appeal is, in a majority of the states, "limited to bringing the judgment before the Appellate Court "for review; and if a proper stay bond has been given, to sus- "pend the right to enforce it by execution. In other respects, it "may be relied on as an estoppel; Nill vs. Compant, 16 Ind., "107; 79 Am. Dec., 411; Bank of N. A. vs. Wheeler, 28 Conn., "433; 73 Am. Dec., 683; Taber vs. Hovey, 117 Mass., 108; "Planters Bank vs. Calvit, 3 Smedes, etc., M. 143; 41 Am. Dec., "616; Scheibel vs. Slagel, 89 Ind., 328."

The Kentucky authorities referred to in appellant's brief, neither of them, sustain the proposition urged by him.

On page 287, of Biglow on Estoppel, 5th edition, the author, after commenting on cases, states the rule as follows.

"As the result of the cases, the construction placed upon "the Constitution and acts of Congress relating to judgments of "courts of record of the sister American States, of the District "of Columbia, and of the Federal courts, may be thus stated:"

1. "Such judgments are to be regarded as record evidence "throughout the Union."

2. "Such judgments, if final, and conclusive when rendered, "are to be regarded as conclusive throughout the Union upon "all issues that were tried in the sister State, even though the "proceedings were irregular and erroneous, and it may be *added* "*though an appeal or a proceeding to* vacate the same be pend- "ing unless the effect of the appeal be to abrogate or suspend "the judgment. Citing Embry v. Palmer, 107 U. S., 3, 10. "Merchants Insurance Co. v. DeWolf, 33 Penn. St., 45."

The Kentucky Statute does not suspend the judgement by reason of an appeal, but expressly says it shall not be suspended; the Code provides a mode of procuring a suspension or modification of the order of injunction by the party taking proper steps within

twenty days after the rendition of the judgment. But no such steps were taken in this case. See Act of 1894, copied in Code as part of section 747.

On page 60 Mr. Biglow, in writing on the subject of *res judicata*, says:

"While if, notwithstanding any subsequent proceedings, it " (the judgement) remains in full force and vigor, as in the case " of a writ of error, there is a case of *res judicata*, citing Hughes " vs. Dundee Mortgage Co., 28 Federal Reporter, p. 40. "

III.

RES JUDICATA.

This question involves a consideration of assignment of errors number four, holding the plea of *res judicata* to be good, and number five, in awarding an injunction against the defendant Stone, etc., restraining them from valuing the franchise, and it also involves the sufficiency of the petition.

There was quite a number of cases submitted together, and the opinion delivered by Judge Taft takes a case applying to each class of cases and makes it cover or apply to all the cases of that class. The case of the President, Directors and Company of the Bank of Kentucky vs. Samuel H. Stone, etc, and the case of the Bank of Kentucky vs. Samuel H. Stone, and the case of the Farmers Bank of Kentucky vs. Samuel H. Stone, etc, on all of the same class, and the opinion in the case of the President, Directors and Company of the Bank of Kentucky vs. Samuel H. Stone, etc., which is on page 183, applies to the Farmers Bank case just the same as if delivered in that case.

On page 232 of the record the opinion in the Farmers Bank case is as follows:

" This case is controlled by the points already decided. The " Farmers Bank in prior adjudication with the County of Frank- " lin, the City of Frankfort and the City of Henderson, was con- " clusively adjudged to have an irrevocable contract under the " Hewitt Act, exempting it from any taxation in excess of that " provided therein. There was no adjudication, however, be- " tween the Farmers Bank and either Scott County or Hender- " son County. It therefore follows, from what has already been " decided, that as to Scott County and Henderson County, the " demurrers to the Bill should be sustained, and the Bill must " be dismissed; while as to the other defendants, the demurrers " will be overruled, and the motion for a preliminary injunction " granted. "

The opinion was as a matter of fact read to the attorneys some time in May, and the 25th day of June was fixed by the Court for all of the parties to meet, and judgment was to be entered in all of the cases.

The Farmers Bank of Kentucky served notice on the County of Henderson on the 22d day of June, 1898, that it would file an amended bill on the 25th day of June, 1898, (see pages 160, 161 of record), and it did file its amended bill on that day setting up two records in which judgment had been rendered in its favor in accordance with the opinion of Chief Justice Pryor, holding that the acceptance of the Hewitt Act constituted an irrevocable contract, and these records were filed with the amended bill and both contain judgments in favor of the bank holding that the bank had an irrevocable contract, and enjoining the County and the Sheriff from collecting taxes, etc. (See amended bill on page 161 of record.)

The records are exhibit "N" on page 164 and exhibit "M" on page 173. The judgments on these records are on page 171 and page 178. The Court, by Judge Taft, held that these records presented a good plea of *res judicata* as to Henderson County, and permitted them to be filed by order on page 160 of record. By consent of parties, as fully appears in the judgment, the case was submitted for final decree, and the Court rendered judgment which is on page 180 of the record.

By an act of the General Assembly of the State of Kentucky, entitled "An Act to make taxation equal and uniform in counties where an *ad valorem* tax is levied by the court," approved March 8, 1876, it was provided that the property of all banks should be assessed for taxation and made to pay taxes to the counties in which the banks were located. The City of Frankfort, and Franklin County, attempted to coerce the payment of taxes from the Farmers Bank under this act of 1876, but the Bank filed a bill in equity in the Court of Common Pleas in Franklin County to enjoin and restrain the County and City from collecting or assessing any taxes against it, upon the ground that it was exempted from such taxation by the terms of its charter as amended. That question was decided by the Common Pleas Court, in favor of the Bank, and appealed to the Court of Appeals by the County and City and the judgment of the Common Pleas Court was affirmed by the Court of Appeals in the opinion in the cases of Franklin County vs. the Deposit Bank, Bank of Kentucky, and Farmers Bank of Kentucky, reported in 87th Kentucky, page 370. Judge Bennet, who delivered the opinion of the court in these cases, took the Bank of Kentucky as the leading case, deciding that the same principles enunciated in that case *applied to the Farmers Bank*, their charters being alike, and both passed previous to 1856.

The Court distinctly decided the following propositions in the said cases. We quote from the syllabus:

1st. "The State reserves the power to make, for a valuable "consideration, a binding contract, and with respect to her own "contracts she stands upon precisely the same footing that she "does with respect to contracts made between individuals, in so "far that she can not pass any law impairing their obligation."

2d. "The charter of a corporation, created by an act of the "Legislature, providing that the corporation, in consideration "of paying to the State a specific tax or bonus, is to be released "from all other taxes, constitutes a binding contract, from which "the State can not recede without the consent of the corpora- "tion, unless the State, in making the contract, expressly reserves "the power to alter or annul it, or unless there is a general law "in force at the time which authorizes the State, by subsequent "legislation, to alter or amend it, and nothing appearing in the "charter showing that the general law is not to govern."

3rd. "Such a contract exempts the corporation from the "payment of City and County taxes, as well as from the pay- "ment of any other tax to the State, the city and county being "parts of the State, and have no power to levy and collect taxes "without authority from the State."

4th. "An act of the legislature continuing the charter, "privileges and rights of a corporation beyond the time fixed by "the original act of incorporation for their existence, does not "have the effect of creating a new charter, but merely extends "the life of the one already in existence, and, therefore, the Act "of February 14th, 1856, by which the legislature reserved the "right to alter and amend at pleasure charters thereafter "granted, does not apply to the Act extending the charters "granted prior to the Act of 1856."

5th. "Even if the extending charters of the Bank of Ken- "tucky, and the Farmers Bank of Kentucky, which acts of "extension were passed since the Act of 1856, can be regarded "as creating new charters, it is manifest, from the obligations "imposed by the acts of extension and from the nature of the "business of these corporations, although not expressed in so "many words, it was the intention of each of these acts to con- "tinue in force an irrevocable contract, and that the first section "of the Act of 1856 should not apply."

On page 330, in the opinion, the Court clearly intimates that if it were material to decide the question, it would decide that the grant to the banks was in consideration of a public service; but the Court did not deem it necessary to decided that point but passed the decision upon the ground of contract rights that the banks could not be divested of. The Court said:

"To deny the State power to make binding contracts is a "denial of its power as a sovereign."

On page 381 the Court says, in speaking of the contract of the State:

"If her contract is without any valuable consideration, it is "a *nudum pactum;* so is that of the citizen, but if there is a "valuable consideration to support it, she is bound by it, not "upon the idea that she has surrendered or bartered away her "sovereignty, but that she has exercised it in accordance with "what she deems to be for the best interest of her citizens."

After deciding that the charter constituted a contract with the State, the Court, in respone to the contention that it did not bar the counties and cities from levying and collecting taxes for city and county purposes, uses the following language on page 385:

"In this position, counsel clearly overlook the fact that the "county and city are integral parts of the State, and that they "can not levy and collect taxes without the authority of the "State conferring that right upon them, so the absurdity is "presented that the State contracts with the appellee, in con- "sideration of its paying 50 cents upon each one hundred dol- "lars of its capital stock, to release it of all tax or bonus. This "is the meaning of the language, and at the same time author- "izes its local sub-divisions to levy and collect other taxes of the "appellee, that is to say, that the State, by its contract with "the appellee deprives itself of the right to levy and collect "other taxes off the appellee, by way, notwithstanding, author- "ize all of its sub-divisions, if the appellee's property and "business were distributed in all of them, to levy and collect "other taxes off it. It seems that it would occur to one at first "blush that such a procedure would be a palpable violation of "the contract. 'Under such a contract between individuals "such a doubt could not exist.' The State, when she makes "a contract, based upon a valuable consideration, stands upon "precisely the same footing."

As to the Act of 1856 applying to the extension of these charters, on page 587 the Court says:

"There is a broad distinction between the extension of a "charter and the grant of a new one. An act which continues "the life of a charter to a period beyond the time fixed in the "charter for its expiration, and reserves the corporate organiza- "tion privileges, powers, duties and rights, is an extension of "the charter. Thus extended it is the same charter, with a "continued lease of life, under which the organization must be

"kept up; to which the company must look for its powers, "privileges, and rights by which it is to be governed and con- "trolled. The act of extension relates back to the date of the "charter. The legislature and the company are presumed to "have contracted for the extension with reference to that period "of time when the respective rights of the contracting parties "were agreed on; which agreement, in consideration of the "continuous discharge of the obligations therein expressed, to "be continued beyond the time first agreed on. (See Angell "& Aimes on Corp., section 780; People v. Marshall, Ill. Rep. "672; Exeter Bank v. Rogers, 7 N. H., 32; Kennebec Bank v. "Richardson, 1 Greenleaf, 72.)

"Here the legislature, by the Act of 15th of February, 1858, "continued the charter privileges and rights of the appellee "twenty years from the first day of October, 1864; *this extension "did not have the effect of creating a new charter, but merely "extended the life of the old one which was already in existence.* "Therefore, the Act of the 14th of February, 1856, does not "apply; for the third section expressly provides that the act "shall only apply 'to charters and acts of incorporation to be "granted hereafter.'"

And on page 388 it is manifest that it was also the opinion of this court that the charters of the Farmers Bank and the Bank of Kentucky showed ubon their face that the legislature never intended that the Act of 1856 should apply to either of said charters. On page 389, the Court distinctly says:

"The appellee (Farmers Bank of Kentucky) was chartered "in 1850, which was to continue in force until the——day of "————1880. By the fifteenth section of said charter "the appellee was required to pay annually into the State "Treasury fifty cents on each one hundred dollars of its capital "stock, which, according to said section, shall be in full of all "tax or bonus.

"By an act of the legislature, approved March 10, 1876, the "appellee's charter was extended for the period of twenty-five "years from and after the time fixed in said charter.

"*The principles announced in the Bank of Kentucky case "(supra) 'apply to this case.'*"

So we claim that those questions as to the contract rights of these two banks have distinctly decided and settled by the Kentucky Court of Appeals in favor of the banks, and that the matter is *res judicata.* The 87 Kentucky cases fix the status of these banks, and it has never been changed, except to the extent of taxing them as prescribed in the Hewitt Act.

We understand that it will be claimed by the appellees that the *proviso* in the act of extension of the Farmers Bank leaves the charter subject to the Act of 1856. Our answer to that point is: First, that it was distinctly and necessarily passed on and decided by the Court of Appeals of Kentucky in the 87th Kentucky case in favor of the Farmers Bank. The Court there held that the Act of 1856 did not apply to the Farmers Bank, and that its extention related back to the original charter and simply prolonged the life of the charter; that the third section of the Act of 1856 excepted it from that Act. The Court also decided that it was the evident intention of the legislature from the charter itself that the Act of 1856 did not apply. Second, the act of extension itself distinctly provides that "No amendment or repeal shall impair other rights previously vested." Our contract rights as to the payment of tax had previously vested, and the provision itself saved and protected them.

In 1886 what is known as the Hewitt Act was passed. The Farmers Bank accepted the provisions of this act, as above stated, and in 1893, after the adoption of the last Constitution of Kentucky, the City of Frankfort and the County of Franklin again attempted to levy and collect taxes from the said banks for municipal and county purposes, as also did the City of Henderson. The Bank sued out injunctions against the City of Frankfort and the County of Franklin, and the Farmers Bank also sued the City of Henderson, in which they set forth their contract under their charters, and the contracts under the Hewitt Act, and made the distinct issue that they could not be taxed for any purpose, or in any way, for any years except as provided in the Hewitt Act, and the Farmers Bank claimed the right to be remitted to its chartered rights in the event that the State was given the right to cancel or retire from the contract made under the Hewitt Act. These issues in all these cases were decided by the lower courts against the banks. Upon an appeal to the Court of Appeals the cases were reversed, and the Court of Appeals, speaking through Chief-Justice Pryor, decided that the acceptance of the Hewitt Act by the complainant banks in the form and manner prescribed by the Act, and by the continuous compliance with the provisions of the Act constituted an irrevocable contract; and that these banks had the right to pay these taxes as prescribed in the Hewitt Act during the existence of their charters as extended, and that the same was in full of all other taxes whatsoever, and directed the lower courts to render judgment in conformity with the opinion, and, in obedience to the mandate of the Court of Appeals, judgments were accordingly rendered by the Franklin Circuit Court and by the Henderson Circuit Court. Complete copies of the entire proceedings in all of these cases have been filed with, and made parts of, the original bills filed by these complainants, and will fully bear out and justify all of the statements made in this brief.

The judgment rendered by the Franklin Circuit Court in the Farmers Bank cases under the Hewitt Act are the same in both cases, and read as follows:

"FRANKLIN CIRCUIT COURT,
January 21, 1896.

"THE FARMERS BANK OF KENTUCKY, ... *Plaintiff*,
versus Judgment,
"THE BOARD OF COUNCIL OF THE CITY OF
"FRANKFORT, &C., ... *Defendants.*

"This day came the parties by their attorneys, and this cause "having heretofore been submitted for a jndgment conforming "to the opinion and mandate of the Court of Appeals heretofore "filed, reversing the former judgment of this Court, and the "Court being sufficiently advised, it is adjudged that Article 2, "of the Act of the General Assembly entitled 'An Act to Amend "'the Revenue Laws of the Commonwealth of Kentucky,' "approved May 17, 1896 (General Statutes, Chap. 92, Art. 2), "and the acceptance thereof, by the plaintiff, constituted a con- "tract between the plaintiff and the Commonwealth, which the "latter can not alter or change without the consent of the "former; by the terms of which contract the plaintiff can not, "during the continuance of its charter, be assessed for taxation "or taxed for State purposes in a different mode, or at a greater "rate of taxation than as provided for in said act, and can be "assessed for taxation and taxed for county and municipal pur- "poses only upon its real estate used by it in conducting its busi- "ness; that the provisions of the present constitution of this State, "and of the Act of November 11, 1892 (Art. 3, Chap. 103, Acts "1891–2–3), in so far as they were intended to provide for any "assessment of taxation of, for county and municipal purposes, "its real estate used in conducting its business, are in violation "of and repugnant to the Federal Constitution, and void; that "the Board of Valuation and Assessment provided for in said "act of November 11, 1892, had and has no authority in law to "assess or value the plaintiff's franchise for taxation, or the "Auditor to apportion or certify the same or any part of the "same, for county or municipal taxation, that the temporary "injunction which was granted in this cause at the commence- "ment of the action be and the same is now hereby made per- "petual, and the defendant be, and each of them are, perpetually "enjoined and restrained from levying upon or selling any "property of the plaintiff for the purpose of collecting any "taxes for the County of Franklin, upon the franchise or prop- "erty of the plaintiff, except taxes upon its real estate used in "conducting its business. And it is further adjudged that the

"plaintiff recover of the defendant, its cost in this action "expended."

The judgments in the Henderson Circuit Court is to the same effect, and reads as follows:

"HENDERSON CIRCUIT COURT,
"September Term, October 29, 1895.

"THE FARMERS BANK OF KENTUCKY . . . *Plaintiff*,
versus No. 860. In Equity.
"THE CITY OF HENDERSON, ET AL . . . *Defendants.*

"This cause coming on to be further heard and the man- "date of the Court of Appeals having been heretofore filed "herein, whereby said Court reversed the decision of the Hen- "derson Circuit Court, and the plaintiff now filing herein the "opinion of said Court of Appeals in which, in substance, it is "decided that neither the capital stock, surplus fund, or "undivided profits of the plaintiff bank, nor any of its prop- "erty (save and except such real estate as is specifically men- "tioned in chapter 92, article 2, section 7 of the General Statutes "of Kentucky, commonly called the Hewitt Law) shall be or is "subject to municipal taxation, or taxation by any county of "this Commonwealth, during the corporate existence of the "Bank; and defendant declining to plead further, it is therefore "adjudged that the injunction prayed for by the plaintiff herein is "granted, and the defendants be, and they are, enjoined and re- "strained from collecting from the plaintiff, the said bank, the "amount set forth in the petition as taxes and penalty claimed by "said city as assessed against said bank for the year 1893, or "any other tax or taxes, and from levying upon or selling the "real estate or any other property of the plaintiff, and the "said injunction be, and is hereby, made perpetual, also that the "aforesaid tax or penalty in the petition mentioned is illegal "and void, and that the plaintiff recover from the defendant, "the City of Henderson, the costs of this action, for which exe- "cution may be issued.

"HENDERSON CIRCUIT COURT.

"THE FARMERS BANK OF KENTUCKY, ... *Plaintiff.*
versus Judgment.
"THE COUNTY OF HENDERSON, ... *Defendant.*

"This action coming to be heard, and in appearing that the "Court of Appeals of Kentucky has rendered decision to the "effect that during the corporate existence of plaintiff under its

"present charter the capital stock, surplus and undivided profits "and other property of said bank is not subject to municipal "taxation or taxation by any county of the Commonwealth, and "that the defendant the County of Henderson sought to compel "the plaintiff to pay taxes in the sum of $541.57, the payment "of which was enjoined under plaintiff's above styled action, "filed December 1, 1894, and the defendants declining to plead "further, it is adjudged that the defendants be enjoined and re- "strained from collecting from plaintiff said sum of $541.57 and "from levying upon or selling the realty and other property "of plaintiff, and that the alledged tax and claim of said county "is adjudged illegal and void, and that the said injunction be "made perpetual, and that plaintiff recover from the defendant "the County of Henderson the costs of this action, for which "execution may be issued."

"HENDERSON CIRCUIT COURT,
"——— Term, 187–.

"FARMERS BANK OF KENTUCKY, ... *Plaintiff.*
versus Judgment.
"COUNTY OF HENDERSON, &C., ... *Defendants.*

"This action coming on to be heard, and it appearing that "the Court of Appeals of Kentucky has rendered a decision to "the effect that during the corporate existence of plaintiff under "its present charter the capital stock, undivided profits, and "surplus and other property of said bank are not subject to "municipal taxation or to taxation by any county of this Com- "monwealth, and that the County of Henderson sought to com- "pel the plaintiff to pay taxes to it in the sum of five hundred "and thirty-eight dollars and fifty cents, the payment of which "was enjoined in this action filed October 16th, 1893, and "defendants declining to plead further, it is adjudged that "defendants be enjoined and restrained from collecting from "plaintiff said sum of $538.50 and from levying upon or selling "the realty or any other property of plaintiff, and that the "alleged tax and claim of said county *is* adjudged illegal and "void, and that the said injunction be made perpetual, and that "plaintiff recover from the defendant the County of Henderson, "the costs of this action, for which execution may be issued."

These adjudications constitute a settled rule of property, and absolute finality as to all the issues raised between the parties to these suits. The City of Frankfort and the County of Franklin, and the County and City of Henderson, and the County of Scott and the City of Georgetown, are all threatening and determined to enforce the collection of taxes against the banks for municipal and

county purposes, as soon as the defendants, Samuel H. Stone, Charles Finley and G. W. Long will fix a value on the franchises of the complainants and certify it to the county clerks, and by so doing they will necessarily impair the obligations of the contract of the Farmers Bank, and thereby interfere with its constitutional rights; by so doing they will subject the bank to a multiplicity of suits, by reason of the provisions of its charter; the cities will garnishee the debtors of the bank, serve indiscriminate and innumerable attachments upon their debtors; cast a cloud upon the title to property, and produce endless confusion and irreperable injury to the bank—injuries against which it has no remedy at law.

As heretofore set forth in this brief, and fully set forth in the records filed in exhibits in the bill of complaint, the particular question as to the liability of the Farmers Bank of Kentucky to pay any taxes, for any purpose whatever, except as specified in its charter and in the modification of its charter by virtue of the Hewitt Act, has been distinctly and sharply decided by the Kentucky Court of Appeals and judgments rendered by the lower courts in conformity therewith in seven separate suits: First, in 1889, in the case of the Commonwealth and Greenup County vs. the Farmers Bank of Kentucky; second, in 1884 and 1887, in the case of the City of Frankfort vs. the Farmers Bank of Kentucky; third, in the case of the County of Franklin vs. the Farmers Bank of Kentucky; fourth, in 1895, in the case of the Farmers Bank of Kentucky vs. the City of Frankfort; fifth, in 1895, in the case of the Farmers Bank of Kentucky vs. the County of Franklin; sixth, in 1895, in the case of the Farmers Bank of Kentucky vs. the City of Henderson; and seventh, the Farmers Bank of Kentucky vs. the County of Henderson. All of the pleadings and proceedings in all these suits except the Greenup County suit, the record of which can not be found, are now before the court and fully appear in the record in these cases.

We submit to the Court that the judgments rendered by the Franklin circuit court and the Henderson circuit court in all of the cases in conformity with the opinion of the Kentucky Court of Appeals, under the Hewitt Act constitute a complete and final settlement of all of the questions involved therein, and present an absolute estoppel against the defendants to these bills of complaint, and a complete bar to any effort by all of them, or any of them to proceed to attempt in any way to value or assess for taxation any of complainants franchise, or to in any way levy or collect any taxes from complainants except as prescribed in their charter; that the defendants are estopped from denying that we have a contract and are estopped from denying that the property of the bank is exempt from municipal or county taxation. Said suits and judgments, we claim, are *res adjudicata* of all matters contained therein and established beyond question the contract of the complainant banks as set forth in the bill of complaint.

We refer the Court to the cases of Horner vs. United States, 143 U. S., 576; also Scott vs. Denold, 165 U. S., 71, and Chappel vs. United States, 160 U. S., 509. These cases decide that the court having jurisdiction by reason of a constitutional question, and having thus acquired jurisdiction, as said in the Chappel case, the court "has the power to dispose not only of the constitutional question, but of the *entire case*, *including* all questions, whether of jurisdiction or of *merits*."

To say that this court would have to decide, as an original proposition, whether the banks had a contract or not, before it took jurisdiction, would require the complainant to actually win its case on the merits before the court would take jurisdiction; this would certainly be an anomaly in jurisdictional proceedings. Upon examination of the bill upon a demurrer to jurisdiction, the court, in any case where it was at all questionable, would overrule the demurrer and take jurisdiction in order to pass upon the merits of the case, and after hearing the case, decide against the complainant, yet the jurisdiction attached at the beginning of the case, and before the real question was actually decided, and having once attached the jurisdiction goes to all questions raised in the case.

We think the decision of the Supreme Court in the case of the City of New Orleans against the Citizens Bank, recently decided, and the opinion delivered by Justice White, is conclusive of the cases at bar.

The Court will observe upon reading that case, that the opinion does not make the jurisdiction of the court turn upon its deciding that the bank had a contract as an independent or original proposition but the court takes jurisdiction of the entire case, and by reason of the judgments rendered by the Louisiana State Courts deciding the contract rights of the bank and affirmed by the Supreme Court of the State,—they decide those judgments to be conclusive of the contract rights of the parties, and jurisdiction was taken as a matter of course. The opinion seems to concede the jurisdiction as a matter of course upon the presentation of the contract in the bill, and the decision of the State Court construing it.

This Louisiana case is very similar to the case at bar; there was an extension of the charter of the bank in that case, also judgments rendered construing the contract and pleaded in the Federal Circuit Court, as *res judicata*, and the injunction was asked against the Board of Valuation and Assessment and the city. The court decides that in a suit by the bank, a judgment in favor of the bank enjoining the assessment, levy or collection of tax for one year, upon the ground that it is a violation of its contract rights, was a complete bar to any proceedings of the city or Board of Valuation to assess or collect taxes for another year. Mr. Justice White, on page 15 of the opinion, uses the following language:

"The proposition that because a suit for a tax of one year is a "different demand from the suit for a tax for another, therefore "*res judicata*, can not apply, in reality substantially denies and "destroys it. The estoppel resulting from the thing adjudged "does not depend upon whether there is the same demand in "both cases, but exists, even although there be different "demands, when the question, upon which the recovery of the "second demand depends, has under identical circumstances "and conditions, been previously concluded by a judgment "between the parties or their privies. This is the elemental "rule, stated in the text-books and enforced by many decisions "of this court. A brief review of some of the leading cases "will make this perfectly clear. In Bank vs. Beverly (1 How., "134–139), it was held that a construction of a will effecting "the rights of parties must govern in subsequent controversies "between the same parties, without reference to the different "nature of the demands. In Tioga R. R. Co. v. Blossburg, &c., "R. R. Co. (20 Wall., 137), and Mason Lumber Co. v. Buchtel "(101 U. S. 638), it was held that when the proper construction "of a contract was in controversy, the construction adjudged by "the court would bind the parties in all future disputes. In "Cromwell v. Sac. (994 U. S. 353), after a full statement of the "nature of the estoppel resulting from the thing adjudged where "the demand was the same in both cases, the court then con-"sidered the extent of the estoppel, where the causes of action "were distinct, and said (p. 353):

"'But where the second action between the same parties is "'upon a different claim or demand, the judgment in the prior "'action operates as an estoppel only as to those matters in "'issue or points controverted, upon the determination of which "'the finding or verdict was rendered. In all cases, therefore, "'where it is sought to apply the estoppel of a judgment ren-"'dered upon one cause of action to the matters arising in a "'suit upon a different cause of action, the inquiry must always "'be as to the point or question actually litigated and deter-"'mined in the original action, not what might have been thus "'litigated and determined. Only upon such matters is the "'judgment conclusive in another action.

"It is unnecessary to multiply citations of authority, as the "subject has been quite recently fully considered and passed "upon by this court. In Last Chance Mining Co. v. Tyler "Mining Co. (157 U. S., 687) where an estoppel resulting from "the thing adjudged was enforced, this court said (p. 687: "'The law in respect to estoppel by judgment is well settled, "'and the only difficulty lies in the application of the law "'to the facts. The particular matter in controversy in the "'adverse suit was the triangular piece of ground, which is

"'not the matter in dispute in this action. The judgment in "'that case is therefore not conclusive in this as to matters "'which might have been decided, but only as to matters which "'were in fact decided,' citing a number of authorities.

"It follows then, that the mere fact that the demand in this "case is for a tax for one year and the demands in the adjudged "cases were for taxes for other years, does not prevent the "operation of the thing adjudged, if, in the prior cases, the "question of exemption was necessarily presented and deter-"mined upon identically the same facts upon which the right "of exemption is now claimed."

The facts in the case relied upon as *res judicata* are practically the same as the case now before the Court.

In Mills, Gd'n, vs. the City of Hopkinsville, 11 Ky. L. R., 164, the Kentucky Court of Appeals decided that:

"A judgment for the defendant, in an action to enjoin the "collection of taxes, is a bar to an action by the plaintiff to "recover back the taxes after he has paid them. And the "judgment is not only conclusive as to the taxes for the par-"ticular year to which the action related, but also to the taxes "for subsequent years, the issue being between the same parties "and upon the same facts."

The Kentucky authorities are very clear upon the general question of *res judicata*. In Tallbott vs. Dodd, 5 Dana, 193, the court decided that:

"Judgment of a court of competent jurisdiction is, in gen-"eral conclusive, not only as to all matters determined by it, "but all incidental matters which might have been properly "litigated and decided in the same suit."

"Judgment of a court having jurisdiction is conclusive "between the same parties, and for the same cause, either in "the same or any other court."

3 Bibb, 399; 1 Mar., 526; 2 Mar., 354; and 527; 3 Mar. 435; 4 Mon., 444; 7 B. Mon., 400; 11 Bush, 362; 9 Bush, 166.

"When a matter is once put in issue and is passed on by a "court of competent jurisdiction, it can not be again litigated "between the same parties, so long as the former decision con-"tinues in force."

Davis etc., v. McCorkle, 14 Bush, 746; also see 14 Bush, 781; 78 Ky., 424; 79 Ky., 119; 81 Ky., 22; 82 Ky., 222.

In the Louisiana case the court puts considerable stress upon the fact that the mode of taxation as to the Louisiana Bank had been a rule of property for about sixty years, and by the construction of the charter of the Bank it had become a rule of property. We call the attention of the Court to the fact that as to these old banks, particularly, the mode of taxation and the rights of the parties have become, and have been recognized, as a rule of property in Kentucky for over sixty years, and the courts have without variation construed the statutory exemption to have existed ever since the institution of the banks until it has become a settled rule of property that, we think, this court will recognize and not overturn.

The decision fully protects the complainant from any assessment or collection of any taxes other than those enumerated in their contract under the Hewitt Act. The law, as a rule of property, has never been changed, and there was no attempt to change it by any judicial utterance until the present year, and that by the opinion recently delivered by Judge Paynter in the Owensboro cases. The Farmers Bank was not a party to any of the cases decided by Judge Paynter.

MANDAMUS.

The answer pleads that a mandamus proceeding has been instituted in the State Court by the city of Frankfort to compel the Board of Valuation and Assessment to certify the apportioned valuation of the franchises of the Farmers Bank; that this mandamus proceeding was begun before the action under consideration, and is pending, and that the injunction issued by the circuit court will be in effect an injunction against that proceeding in the State courts.

It is well settled that the pendency of a suit in a State court is no bar to a suit upon the same subject matter in a circuit or district court of the United States. See the City of North Muskegon v. Clark, 22 U. S. App., p. 522, and cases therein cited. The injunction granted by the lower court may be offered as a defense by the Board of Valuation and Assessment in the court where the mandamus proceeding is pending, just as a judgment rendered in one of two pending suits for the same cause of action may be offered by supplemental pleading in evidence. The sufficiency of the defense will be for that court. The lower court did not enjoin any suit at all; all it did enjoin was a certification of the taxes; that does not require the defendant to disobey an order of any other court, or restrain their prosecution of the suit therein. The above language, or the most of it, is copied from the opinion delivered by Judge Taft on page 198 of the Record, and seems to us conclusive upon this point. Furthermore, the court will find, upon

investigation of the mandamus suit, that it does not cover the year 1897, and the Board of Valuation and Assessment is not asked to make an assessment for the year 1897.

BOARD OF VALUATION NOT PARTIES.

It is claimed by counsel for the appellant that the judgments of the Franklin circuit court are not *res judicata*, because they say that the members of the Board of Valuation and Assessment were not parties to that suit, and cite *in re* Ayre, 123 U. S., page 443. An examination of the Ayre case will show that it has no application whatever to the case at bar. The point there decided was that the court would not entertain jurisdiction of the case because the State was the real party in interest, and the attempt was made to reach the State and sue it by proceedings against State officials. In the case at bar, as decided by the circuit court, the Board of Councilmen of the City of Frankfort, and the County of Franklin are the real parties in interest; the State of Kentucky has no interest whatever in the taxes sought to be collected by the city and counties. The members of the Board of Valuation and Assessment have no interest whatever in these taxes; they merely perform the ministerial duty of apportioning to the counties and cities what property they shall tax; they are simply appointed by the State or legislature to act as agents of the cities and counties in providing a mode of assessing the property of the banks—they occupy the relation to the city or county that their assessors used to do, the difference being that they are appointed by the legislature and not by the city or county. They assess the property for the municipalities and counties, hence they act as their agents; they are nothing more than the assessors of this kind of property for the cities and counties and where the assessment or apportionment is made by this Board, then the city and the county has a basis or assessment to proceed on to collect their municipal taxes, etc.

The point attempted to be made by appellant's brief in regard to judgment being an adjudication as to a matter of law under section 111 of the brief, is not well taken. The adjudication of the Franklin circuit court was upon the facts alleged in the petitions, which were all admitted to be true upon the demurrer. A judgment upon a demurrer is just as binding as if the allegations of the petition had been denied, or as a judgment upon a verdict.

Mr. Biglow, in his work on Estoppel, 5th Edition on page 56, uses the following language:

"A decision upon a demurrer which has, however, clearly "gone to the merits of the case, by being based distinctly upon "a specific allegation of the facts touching the substance of "the action of the defense, is an effectual bar to further litiga-

"tion and upon the facts admitted it is held to be as conlusive "as a verdict,"

citing Bissell v. Spring Valley, 124 U. S., p. 225, and a long list of other authorities of different States.

The very identical questions are raised now that were decided by the Franklin Circuit Court, and the Henderson Circuit Court; the appellants are attempting to do now the identical thing they were enjoined from doing in all of these suits; the records in which are now before this Court, hence the plea of *res judicata* is complete.

We have not seen the brief to be filed by the city or county of Henderson consequently we have not referred specifically to their brief. The opinion of Justice Harlan and Judges Lurton and Taft, delivered by Judge Taft upon the question of *res judicata* in this case is so full and complete upon these questions that we do not consider it necessary or proper to further elaborate our argument upon that proposition, our object in saying what we have said to the Court on this question of *res judicata* was to get before the Court in the brief the facts in regard to the matter, and call the Court's attention to some of the authorities. We do not deem it necessary, nor are we able, to add anything to the exhaustive argument on this subject in the opinion, which is on page 148 of record.

IV.

ACCEPTANCE OF HEWITT ACT CONSTITUTED A CONTRACT.

As early as 1839, in Johnson vs. Commonwealth, (7 Dana, 342), where there was an effort to tax the shares of stock in a bank in excess of the terms of the contract as provided in the charter of the bank, the Court of Appeals of this State held that the State might enter into such contracts, and that the contract in question placed a limitation upon the power of the State. In the cases of Farmers Bank vs. Commonwealth (6 Bush, 127), and the City of Frankfort v. Bank of Kentucky, (87 Ky., 370) it was held, that the bank could not be taxed beyond its charter rate as fixed by the contract; and in numerous other cases the same doctrine has been announced.

It is plain, therefore, and will not be controverted in the argument of these cases, that the courts of Kentucky have been, and are, committed to the proposition that in each of the charters of the banks granted before 1856, exempting it from taxation for municipal or other purposes, upon condition of its payment into the State Treasury, to the revenue fund of the State, of a certain amount on each share of stock, created a valid contract which the

State can not, under the Federal Constitution, impair by subsequent legislation.

Although these charters were granted before the Act of 1856 was passed, these decisions are not based upon the ground that the charters were granted before 1856, for the legislature had no greater power, and the individual citizen no less rights, after the Act of 1856 than they had before; but they are based solely upon the ground that the provision in the charter of the bank exempting them from all taxation, except for State purposes, created a contract between the State and the banks which were protected from impairment by the Federal Constitution. If the provision in a charter granted prior to 1856 is a contract that must be complied with both by the State and the bank, what reason can be given for holding that a similar provision in a charter granted after 1856 does not create a contract? The Act of 1856 does not undertake, and was never intended to and can not have the effect of, making that a *nudum pactum* which, if done before its enactment, would have created a valid and enforceable contract, because the act reserving the right to appeal or amend all charters and grants to corporations enacted after the 14th of February, 1856, unless a contrary intent be therein plainly expressed, provides "that whilst privileges and franchises so granted may be repealed, no repeal shall impair other rights previously granted."

In the case of the Commissioners of the Sinking Fund v. Green & Barren River Navigation Co. (reported in 79 Ky.), the State leased for the period of thirty years the Green and Barren River line of navigation upon certain conditions and terms expressed in the contract, and in consideration that the company would maintain and keep the line in repair (and permit all boats to navigate the two rivers upon specified rates prescribed as toll. The company went into possession, made many repairs, having fully complied with its contract, until the 5th of April, 1880, when the legislature undertook to repeal so much of the original act of incorporation as leased and conveyed to the company this line of navigation, and so much of the act as gave to the company the tolls and revenues arising or to arise from said line of navigation, and authorized the Sinking Fund Commissioners to take possession. It was held in the decision referred to that the act to incorporate the Green & Barren River Navigation Co., approved March 9, 1868, coupled with the execution of the bond on the part of the company to comply with its contract, constituted a valid and subsisting contract between the State and the appellee, and was not the subject of repeal by the General Assembly.

In criticising the opinion of Judge Pryor, the court below distinguishes the Barren River Navigation Co. case from the opinion rendered by Judge Pryor in the Bank tax cases, by stating that :

"The banks surrendered nothing of value to the State, for "the limited tax exemption of the Hewitt Act, and the power "of revocation was not in any view, therefore, trammeled by "conditions."

This is not the fact as to the Farmers Bank of Kentucky, because at the time of the passage of the Hewit Act and its acceptance of the Hewitt Act it had been adjudged by the Franklin common pleas court, a court of general jurisdiction, that the Farmers Bank of Kentucky, by virtue of its charter, had a contract with the State to pay 50 cents on the $100.00 par value of its capital stock in full of all taxes or bonus, and having this right so adjudged to it, it necessarily parted with it when it accepted the provisions of the Hewitt Act, or at least waived it for the purposes of the Hewitt Act; this we think, was a valid consideration, fully sufficient to support the contract. Moreover, this judgment of the common pleas court was afterwards affirmed by the Court of Appeals of Kentucky.

Such has been the construction given the Act of 1856 by the State courts since its adoption, and to these cases the attention of the court will be called further on.

That the provision in the bank charters exempting banks from taxation, except for State purposes, created a contract, which the legislature could not by subsequent legislation impair, is expressly recognzied in the Act of 1856, and that the State may surrender its right to tax certain classes of property, at least for a limited time, as is the case with the banks in this instance, is too well established by the adjudications of this court to require any argument. Following the Dartmouth College case (4 Wheaton, 683), this court has repeatedly denied the authority of any legislature to impair such contracts. (See Farrington v. Tennessee, 95 U. S., 115.)

With their charter contracts sustained by the numerous decisions of the Court of Appeals of Kentucky, supported by the adjudications of this court, the Banks (the plaintiffs in error) had the right to assume that their charter contract was such as could not be impaired by the State by legislative action.

Under these circumstances the State invited the Farmers Bank (plaintiffs in error) as well as all of the other banks in the State, to waive their charter contracts and enter into a new contract as provided in the act of 1886, known as the Hewitt Law (General Statutes, chapter 92, article 11). The Farmers Bank (plaintiffs in error,) as did the great majority of banks in the State, accepted the proposition, and, up to 1897, have paid the tax, which it was agreed should be in lieu of all other taxes. It seems to us that a stronger case of a contract between the State and the banks could not be suggested. But the opposite side (defendant) admitting the force of the argument and of the agreement, says that it was

expressly provided "that this act shall be subject to the provisions of section 8, chapter 68 of the General Statutes," which is the Act of 1856, reserving the right to repeal or amend. But this provision can not, as we think, we have already demonstrated, affect the question, for the Act of 1856 (section 8, chapter 68, General Statutes) provides "that whilst privileges and franchises may be repealed, no repeal shall impair rights previously vested." And the framers of the present Constitution, of Kentucky, in order to prevent the impairment of such contracts, in section 1 of the Schedule provided that "All the laws of this Commonwealth in force at the time of the adoption of this Constitution, and not inconsistent therewith, and all rights, actions, prosecutions, claims and *contracts* of the State, counties, individuals or *bodies corporate*, not inconsistent herewith, shall continue as valid as if this Constitution had not been adopted."

The Hewitt Act and the contract made under it secures in terms to each bank exemption "from all other taxation whatever, so long as said tax (of 75 cents on each $100 of stock in the bank) shall be paid during the corporate existence of such bank." And now to hold that this exemption is, as to the State, of no force, and can be disregarded by it at its will and any other taxation imposed, because of the provision of the Act of 1856, embraced in section 8 of chapter 68 of the General Statutes, would not only be manifestly unjust, but would overturn all rules as to the construction of Statutes. Where a contract vests the party with certain valuable rights, with provision in the contract that one of the parties may, at its pleasure, disregard it, it is a mere nullity. Following this plain rule of law, as well as justice, the Kentucky courts have always held such contracts inviolable; and it will hardly be claimed that the State adopted this scheme to deprive the banks of rights that they claim have been vested, and so adjudged as to some of the banks for more than half a century.

Not only have the banks surrendered their charter contracts, but they agreed to pay, and in good faith have paid, into the State treasury nearly twice as much tax, estimating property according to actual value, and we may say three or four times as much as is paid by any other kind of property, real or personal; and still further, these payments are made directly into the treasury, without the uncertainty which arises as to the assessment of all other kinds of property, and the delays which occur and the commissions expended in making such collections.

Waiving, however, for the time, the question of whether the banks created after 1856 could have successfully relied upon their charter contracts against a different mode and greater tax subsequently prescribed by the legislature, there was undoubtedly a question then existing between the banks and the State which would have been the subject of litigation, and this alone was a sufficient consideration for the contract entered into between the State and the banks.

The opinion in the case of New Jersey v. Yard (95 U. S., 110), which presented almost the identical question we are now discussing, seems to us conclusive of the case at bar; or, if not conclusive, is entitled to much consideration, by reason of the analogy between the cases. The Morris & Essex Railroad Co. was incorporated by the New Jersey Legislature in 1835. The act provided that as soon as the net proceeds of the road amounted to seven per cent. of its cost it should pay a State tax of one half of one per cent. on the cost of the road, and no other tax should be levied on it. Section 20 reserved to the legislature the right to amend or repeal the act whenever it should think proper. A supplemental Act was passed in 1836, in which the right to amend or repeal was reserved. In 1846, the legislature passed an Act similar to the Kentucky Act of 1856. Another supplemental Act to the road's charter was passed in 1865, authorizing a branch road, and by which the company was vested with all the powers and franchises given in the original and supplemental acts. The 3d section of the last-named Act enacted "that the tax of one-half of one per cent. provided in the original Act to be paid by the company to the State whenever the net earnings of the road amounted to seven per cent. upon the cost of the road shall be paid at the expiration of one year from the time when the road shall be opened and in use to Phillipsburg, and annually thereafter, which tax shall be in lieu of all other tax whatever: *Provided*, That this section shall not go into effect until the company, by an instrument duly executed under its corporate seal and filed with the Secretary of State, shall have signified its assent thereto, and which assent shall be signified within sixty days after the passage of this Act, or this Act shall be void." The instrument prescribed by the last section was duly executed by the company. It is true that in the last Act (1865) no reservation of the right to repeal or amend was reserved, but the case was not made to turn upon that point. The court held that there was a contract, which the State could not impair by subsequent legislation. This case is commented upon at length and approved by the Kentucky Court of Appeals in the case of Commonwealth v. Farmers Bank of Kentucky (97 Ky., 599).

The opinion in the Bank-Tax cases was rendered by Judge Pryor, then Chief Justice, and was concurred in by Judges Hazelrigg, Grace and Eastin, sustaining the contention of the banks that the Hewitt Act constituted a valid contract and could not be repealed by subsequent legislation. Judges Lewis, Paynter and Guffy dissented from that opinion, Judge Paynter writing the dissenting opinion. After this case was decided, the *personnel* of the court was changed, and the opinion in the case at bar was written by Judge Paynter and concurred in by Judges Lewis, Guffy and White, Judges Hazelrigg, Burnam and DuRelle dissenting. So the original opinion in the Bank-Tax cases (some of which are now being heard with these two cases) sustained the validity of the

contract, and the subsequent decision by Judge Paynter, a majority of the court concurring, held, in the two cases now being considered of the Owensboro banks, that no such contract existed, or if such a contract had been made, the right of the legislature to repeal the contract was reserved by virtue of the Act of 1856. The Circuit Court of the United States for the District of Kentucky held, (in the cases now on appeal and considered with these two cases) that the banks (the defendants in error from that court), having been parties to the original case (the opinion written by Chief Justice Pryor), the questions there decided were *res adjudicata*, and could not be relitigated; but at the same time held that, as to all the banks not parties to that action, the repealing act of the legislature applied.

We, therefore, invite the attention of the Court to a review of the reasons given by the Circuit Court of the United States in the opinion written by Mr. Justice Taft for holding that the Legislature had the right to repeal that portion of the Hewitt Law under which these banks claim a contract existed.

In that opinion it is held, that neither the old banks nor the banks organized since the Act of 1856 and prior to the enactment of the Hewitt Act, had an irrevocable contract with the State, by which the taxes on bank stock were limited to 75 cents on each share of $100 of stock, and that the State had the right to amend the charter, or annul it, as to the rate of taxation by reason of the reservation act annexed to the Hewitt Law; and in the opinion in one of the cases—that of the Northern Bank of Kentucky v. Stone, Auditor—the court went on to say that these banks (meanin the old banks) had never any irrevocable exemption to surrender, but accepted the agreement in the Hewitt Act rather than run the risk of being subjected to a larger burden by way of taxation.

We understand it to be a well settled rule, that the Federal courts, in determining a question like the one now presented, whether a State law impairs the obligation of a contract, will not accept as binding upon them the views taken by the supreme court of a State as to whether or not a contract existed between the State and the corporation. (Douglas v. State of Ky., 168 U. S., 502; L. & N. R. R. Co. v. Palmer, 109 U. S., 256.) Recognizing this rule to its fullest extent, the attention of the court is called to the fact that, since the year 1838, from that time up to the date of the opinion rendered by the Court of Appeals of Kentucky (in the two cases from which this appeal is prosecuted, and reported in —— Ky., page ——) it has been held by that court that the bank charters prior to 1856 were irrevocable contracts, and the entire legislation of the State during this entire period has been had with that view. (See Johnson v. Commonwealth, 7 Dana, 342; Farmers Bank of Ky. v. Commonwealth, 6 Bush, 127; City of Frankfort v. Bank of Kentucky *et al.*, 87 Ky., 370.)

The highest court in the State having settled the question as to these charter contracts of the old banks by repeated decisions for so long a period, it seems to counsel that, as between the State and these corporations, there were some rights created, both by legislation and judicial utterances from time to time, that had to be, and were, surrendered by the old banks when they accepted the provisions of the Hewitt Law. All the old banks, as well as the legislative and judicial departments of the State government, recognizes the right of the old banks to stand upon their charter contracts; and it was never contemplated that the reservation of the power to amend or repeal the Hewitt Law applied to this manner of taxation as agreed upon by both parties to the agreement. The right of all the banks had been determined; and the State, for the purpose of having uniformity of taxation, and to prevent the sacrifice of banking capital by onerous local burdens, resolved, by the consent of the banks, to establish that equality that would protect capital in commercial centers and enable the banks in larger cities to maintain an existence.

Many of the banks (termed "country banks") refused to accept the provisions of the Hewitt Law; and in the county where the writer resides all the tax, State, county and town combined, did not exceed 70 cents; and it must, therefore, be apparent that there was a consideration moving the legislature to enact this beneficial statute, by which all of the banks were made equal in the way of taxation, and these institutions relieved of a burden which, if imposed, would destroy the business in commercial cities and retard the growth and prosperity of the State. It is a fact known by all business men, and one of which the courts take judicial knowledge, that the rate of taxation now imposed on the banks exceeds greatly the burden placed upon the real and personal estate of the citizen; and if any inequality exists, it is favorable to the citizen as distinguished from the corporation. That there was a consideration for this difference in the mode and amount of taxation is manifest; and if judicial decisions could confer rights or create that sort of doubt that left even the question of taxation in uncertainty, it is sufficient ground for making a full adjustment of the claims of the old banks by such an agreement as is contained in the Hewitt Law—and the consideration not only affecting the old banks, but every bank accepting its provisions, as it could not have been intended to tax one bank at a greater rate than another.

As was said in McCullough v. Maryland (4 Wheaton):

"The unrestrained power of taxation is the power to des-
"troy; and with a burden of taxation on banking corporations
"of two and a half dollars to the hundred, to which is to be
"added the expenses of the banking institution, the doors of
"the bank must be closed and the money invested elsewhere."

The Court of Appeals of Kentucky, in the case of Sinking Fund Commissioners v. Green & Barren River Navigation Co. already referred to, held that the repeal of so much of the charter of the corporation as deprived it of its contract rights was in violation of the Constitution. And in the case of Commonwealth v. Owensboro Railroad Co. (reported in 95 Ky., page 60), there was an act passed providing that, "All railroads which may hereafter be built in this Commonwealth, under existing charters, or under charters which may hereafter be granted, shall be exempt from all taxation under the laws of the Commonwealth for the period of five years from the date of the beginning of the construction of the new road." The State claimed the right to repeal the law, and attempted to coerce the payment of taxes within the five years. The Court in response to the argument in favor of the payment of the tax, and the application of the Act of 1856 to its provisions, said :

> "It is sufficient to say to this proposition, which, even at "first blush, strikes us as extraordinary and unjust, if attempted "to be applied to those of the appellees who accepted the "offer of the State, and expended their money on its pledge, that "the act of 1856, reserving the right to repeal or amend char- "ter privileges granted by the legislature to particular persons, "has no application to the law of 1884, which, as said before, "was a general law and affected all alike who accepted its pro- "visions or acted on the strength of them."

The act of 1856 was in full force when the two cases of the Green & Barren River Navigation Co. and the Owensboro Railroad Co. were decided.

It is claimed in the opinion in the cases from the Circuit Court of the United States, District of Kentucky, that there is but little, if any, analogy between the case of New Jersey v. Yard and the cases now being considered. It will be recollected in the case of New Jersey v. Yard that the reservation of the power of repeal was inserted in the original act of 1835, and subsequently the general law, reserving the like power applicable to all charters, was enacted. It is true this Court, in determining the question before it in New Jersey v. Yard, laid much stress on the legislative purpose and intent of passing the act of 1865, and that to construe the act of 1865, under which it is claimed the contract was made, as carrying with it the power to repeal would be inconsistent with the legislative purpose.

So we maintain in this case: To say that the banks all over the State were required to go through the form of having their stockholders consent to this contract, and then have it reduced to writing and filed with the Governor of the Commonwealth, and further

agreeing to surrender all their charter rights, it would be unreasonable to hold that the legislature never contemplated making a contract that was binding according to its terms; and to adjudge that the legislature had the power, at its next session after this contract was made, to repeal it, would be inconsistent with the legislative purpose and a fraud upon the rights of these corporations.

It was said by the able judge in the opinion in the case of New Jersey v. Yard: "Can it be believed it was intended by either party to this contract that, after it was signed by both parties, one was bound forever, and the other only for a day?" The same question may be well asked in this case; and the only response that has been made to such a question by the able judge delivering the opinion of the United States Circuit Court is, that there was no consideration for the agreement and no valid exemption prior to that time in any of the bank charters; and if this response is deemed sufficient, it may well be said that the provision of the Hewitt Law, under which this contract is claimed to exist, stands repealed.

It is argued that in the present case there was an express reservation of the power to repeal annexed to the agreement, and this being the case there can be no room for construction. Section 4 of the Hewitt Act by its provisions requires the banks to waive and release all rights they have under the acts of Congress, or under the charters of the State, looking evidently to the fact that the State banks had rights already adjudicated by the courts of Kentucky, and the national banks rights reserved to them by Congressional enactment.

The distinction between the power of the legislature—as said in the Bank Tax Cases—to repeal an article from which a contract arises, and the right to destroy the contract itself when based on a consideration, is manifest; and while, under the present Constitution, the exercise of the taxing power can not be relinquished, the power or right to discriminate in imposing taxes as between the various classes of property has been often recognized by the Appellate Court of Kentucky under the provisions of former Constitutions. There has been no exemption of the banks or their stock from taxation by reason of the Hewitt Act, but the State, recognizing the necessity for uniformity and equality in taxation in taxing such institutions, enacted the Hewitt Law requiring the surrender of the rights of the old banks, under their respective charters, as well as the national banks, and at the same time increased the State taxation upon these banks, in order that no unjust discrimination should exist between corporate and individual property.

V.

APPEAL OF FARMERS BANK vs. CITY OF GEORGETOWN, &c.

WE NOW CALL THE ATTENTION OF THE COURT TO THE QUESTIONS ARISING IN CASE NO. 386 UPON THE APPEAL OF THE FARMERS BANK OF KENTUCKY vs. SAMUEL H. STONE ETC., PARTICULARLY AGAINST THE CITY OF GEORGETOWN AND THE COUNTY OF SCOTT.

The assignment of errors in this case are as follows:

"And the said complainant further says that said decree is erroneous and against the rights of the complainant, because the court erred in dismissing the complainants bill as to the County of Scott and the City of Henderson.

Second. Because the court erred in not deciding that the complainant's contract with the State of Kentucky relieved and protected it from the payment of any taxes whatever to the City of Georgetown or the County of Scott for any purpose whatever.

2. Because the court erred in not issuing an order of injunction against the defendants Samuel Stone, Chas. Finley, and George Long, enjoining them from making an assessment in any way upon the stock of complainant at its bank, at Georgetown, for municipal or county taxation, and it erred in not enjoining the said Stone from making any apportionment of complainant's capital stock to the bank at Georgetown for taxation for any purpose whatever.

Wherefore the complainant prays that the said decree as to the City of Georgetown and the County of Scott be reversed, and that the said court may be directed to enter a decree in accordance with the prayer of complainant's bill of complaint."

The opinion of the circuit court delivered by Judge Taft, on the question raised by the appeal of the Farmers Bank of Kentucky vs. the City of Georgetown, etc., was delivered in the case of the Northern Bank of Kentucky vs. Bourbon County, in which County one of the branches of the Northern Bank was situated. The mother bank was not a party to the litigation. See opinion on page 218 of record. In the case at bar the status of the parties is different. The Farmers Bank of Kentucky, at Frankfort, Ky., is the mother bank, and, as shown from the allegations of the bill filed in this case, and the petition filed in the Franklin Circuit Court against the Board of Councilmen of the City of Frankfort, and against the County of Franklin, the mother bank paid all of

the taxes against the bank, including its branches, that accrued to the State under and by virtue of the Hewitt Act, and the circuit court, in deciding that such payment was in full of all taxes that could be collected from the bank as a whole, necessarily adjudicated that no other taxes could be collected from the bank by any of the municipalities where its branches were in existence, the whole, necessarily, including all of its parts.

On page 7 of the record is the following allegation in the bill of complaint:

"The complainant, through its cashier, made its report and "paid into the State treasury in 1886 the full tax required by "the act described in the foregoing paragraph, and which is "commonly known as the 'Hewitt Act,' and in conformity with "said Hewitt Act, has made its reports in proper form to the "auditor of public accounts on the 1st day of July in each and "every year up to this time, and, until the year 1893, paid into "the State Treasury, on or about the 1st day of July of every "year from 1886, the full tax required by the Hewitt Act, being "75 cents on each share of its capital stock, and a tax at the "same rate as real property was assessed by the State, upon its "surplus, undivided profits and accumulations in excess of 10 "per cent. of its capital stock. These reports continued to be "made by the complainant; but on July 1, 1893, the auditor "refused to receive the tax under the Hewitt Law, although the "complainant tendered the same. He refused to receive it on "the 1st of July, 1894, although the complainant again tendered "the same. The complainant paid the same about the first of "July, 1895, and on or about the 1st of July, 1896, and in the "spring of 1896, at the request of the auditor, and after certain "litigation had been determined in its favor, paid to the auditor "the difference between the amount paid by it on July 1, 1893, "and July 1, 1894, and the amount which it tendered at these "times, and which was the amount due under the Hewitt Law; "so that it is now true that the complainant (that is, the mother "bank) has every year, down to and including 1895, paid the "full tax called for under its charter; and from 1886 to 1896, "the full tax called for under the Hewitt Law. It has also, "during this period (1886 to 1896), paid in full to the munici- "palities where its banking houses are situated the full tax "thereon."

These same allegations are substantially set forth in the petitions against Franklin County and the Board of Councilmen of the City of Frankfort, covering the period of time up to which they were filed. See pages 66 and 67 of record; also pages 83 and 84 of record.

These allegations are all admitted to be true and show that all of the taxes that could possibly have been collected from the bank

or its branches had been paid to the State, by the mother Bank, and it was adjudged by the Franklin circuit court that no other taxes could be collected from the bank for municipal or county or any other purpose, and we claim that these decisions as to the mother bank necessarily include the branches, and are *res judicata* as to the entire bank, which of course includes its branches. We think that in the multitude of cases before the circuit court, it must have overlooked this view of the case.

We also claim that these judgments in the Farmers Bank cases are *res judicata*, not only as to the city of Frankfort and the County of Franklin, but also as to the City of Georgetown, County of Scott, upon the ground that they are necessarily privies to the judgments in those cases; the same questions decided in the Franklin and Henderson cases are decisive of any question that might be raised as between the bank and County of Scott or the City of Georgetown. It would be impossible for either of these parties to escape having the identical question again decided if they were to attempt to tax the bank, and their not making any attempt to tax the bank until now is tantamount to their acquiescing in, and consenting to, the status of the bank as fixed by these decision.

Furthermore, the doctrine of *res judicata* applies to them because the State of Kentucky was practically a party to these old suits. It was represented by its Attorney-General, as the records will show, and he claimed that the banks were liable for municipal and county taxation. The Sheriff of Franklin County, a constitutional officer who represents the State, was a party to all of the suits against Franklin County. Thus we have the principal before the court, and all the integral parts of the State are bound by its acts. It is certainly *res judicata* as to the State, and why not to the counties and cities? It is only through the State that the counties and cities can acquire the right to tax; and if the State, through which they must claim, was a party or privy to these proceedings, and was bound by them, why is'nt its integral parts and all of its subdivisions likewise bound?

As said by Judge Bennet in 87 Kentucky, in illustrating the absurdity of the States being bound by its contracts and at the same time authorizing its subdivisions to collect a tax from the bank:

> "The State, by its contract with the appellee, deprives itself "of the right to levy and collect other taxes off the appellee, but "may notwithstanding authorize all of its subdivisions, if the "appellee's property were distributed in all of them, to levy and "collect other or additional tax off of it."

This, he says, would be a palpable violation of the contract: so, upon the same principles, applicable to principal and agent, it

would be an absurdity to say that the State of Kentucky was stopped by these judgments, and yet its subdivisions and integral parts, whose only claim is through the State, are not estopped? The whole is greater than any of its parts, and the estoppel should be made to apply to all of the counties and municipalities of the State.

We respectfully ask that the judgment of the Circuit Court in favor of the Farmers Bank of Kentucky and against the Board of Councilman of the City of Frankfort, The County of Franklin, The City of Henderson and the County of Henderson and S. H. Stone, etc., be affirmed, and that the judgment dismissing the bill as to Scott County and the City of Georgetown, etc., be reversed.

JNO. W. RODMAN,
Counsel for Farmers Bank of Kentucky.

W. S. PRYOR,
J. W. RODMAN,
Of Counsel.